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UNDUE INFLUENCE AND COERCION

EQUITY'S terminology has often brought confusion to common lawyers. Undue influence is one instance. The scope of the doctrine of undue influence has frequently been misunderstood. In *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.*,[1] Porter, J., after pointing out that the right to avoid a contract is not at the present time confined to cases of duress, remarks that "it depends on the much wider relief given on principles originally evolved in the Chancery Courts under the name of undue influence." He goes on to say that "duress at common law could only be pleaded where the end arrived at was achieved by the use of something in the nature of unlawful force or the threat of unlawful force against the person of the other contracting party. Undue influence in the Chancery Courts might exist where a promise was extracted by a threat to prosecute certain third persons unless the promise were given."[2]

Although the term undue influence has sometimes been used in a very wide sense, even by Chancery judges, its meaning has now become fixed and definite. It is not comparable to such a general principle as public policy or fraud in equity but expresses an independent rule of law. The rule has recently been thus stated by Scrutton, L.J.: "In the Court of Equity in case of a benefit or contractual advantage obtained from a person coming within certain defined relations, such as the relation of parent and

[1] [1937] 2 K.B. 389.
[2] *Ibid.*, pp. 394, 395.

young child, solicitor and client, religious superior and inferior, by the related member of that class, it is enough to prove the existence of such a relation to throw on the recipient of the advantage the burden of proving independent advice to the donor and in other respects justifying the transactions."[3] This is not a complete statement because the rule of undue influence extends to other relationships than those to which a special name may be given. Nevertheless it is confined to a relationship which necessarily involves influence by one party over another. The influence of the dominant over the weaker party may be either properly used or abused. There may be a right use as well as an abuse of the influence naturally springing from the relationship. Unless the inferior party is adequately protected equity presumes that the influence has been abused. This does not mean that there is anything similar to duress at common law or that consent is overborne. The principle is distinct from several others that at first sight may present an analogy.

1. Undue Influence in Equity

The rule of undue influence was first enunciated with respect to the relationship of parent and child. Lord Hardwicke appears to be responsible for the term. In *Morris* v. *Burroughs*[4] he said: "As the parental authority is great, to prevent any undue influence it may have in prejudice of the children, there must, in all cases of this kind, be a valuable consideration moving from the father, and an actual benefit accruing to the child."[5] This is the first instance of the use of the term. In some earlier cases the power of the parent had been expressed by the word "awe," as in *Duke of Hamilton* v. *Mohun* where Cowper, L.C., said with respect to an agreement which was a fraud on a marriage settlement, "The heir is under the awe of his parent in such a case, and not supposed to act freely."[6] On the other hand in *Blunden* v. *Hester*, with respect to the argument that a child was not *sui juris* because of "the awe he was presumed to have of his parent," Parker, L.C., said, "I do not see the argument from the father's power over the child to be of any weight; for if it should ever appear that this power has been abused a court of equity would certainly set aside the release thus indirectly gained."[7] In other words, although the child is a free agent he may be to some extent

[3] *Lancashire Loans Ltd.* v. *Black*, [1934] 1 K.B. 380, 404. We are not concerned with the question whether proof of independent advice is invariably required.

[4] (1737), 1 Atk. 398; West t. Hard. 242.

[5] 1 Atk. 403.

[6] (1710), 1 P. Wms. 118, 121.

[7] (1720), 1 P. Wms. 634, 639.

under parental power and equity will interpose if this power is misused for the parent's own ends. After the decision of Hardwicke, Strange, M.R., could say, "Though there is no very great evidence of undue influence, yet the court will always look with a jealous eye upon a transaction between a parent and a child just come of age and interpose if any advantage is taken."[8]

It was soon made clear that the new rule rested on the likelihood of misuse of the influence attending the parental relationship and not on coercion on a particular occasion by some specific means. In a case in which Hardwicke held that a female servant had gained "as much authority as a guardian" over a young woman he ordered an inquiry into a transaction between them, remarking, "There is strong proof of the general influence which may be gained by proper services, and made proper or improper use of."[9] Northington, L.C., referred to an agreement as "obtained by undue means, and under an improper exertion of paternal influence," holding that "where a father unduly compels a child by paternal influence, the court ought to be strictly rigid in guarding against it."[10] Thurlow, L.C., explained that the court did not permit a guardian to "avail himself of the habits of intimacy and influence (the true honest and just influence as it is in itself) he might have in the mind of an infant or child coming of age."[11]

The modern statements of the law regarding parents, guardians and others *in loco parentis* confirm the true doctrine in unmistakeable terms. In *Berdoe* v. *Dawson*, Romilly, M.R., said that the father "must prove not only that the son understood the transaction, but also that the benefit was not obtained from him by the undue exercise of the peculiar influence possessed by a father over his son."[12] The Court of Appeal in Chancery has expressed itself similarly: "Influence is a thing which is assumed as between parent and child—not that the influence is assumed to be unduly exercised, but the influence is assumed and it is then thrown upon the father, if he takes any benefit, to prove what is called the righteousness of the transaction. . . . When we talk of parental authority we do not think of terror in connection with it—that is not the primary idea—it is not terror and coercion, but kindness and affection, which bias the child's

[8] *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400, 401.
[9] *Cole* v. *Gibson* (1750), 1 Ves. Sen. 503, 509.
[10] *Wycherley* v. *Wycherley* (1763), 2 Eden 175, 177, 180.
[11] (1784), *Welles* v. *Middleton*, 1 Cox 112, 125.
[12] (1865), 34 Beav. 603, 604, 605. It was a case of a family arrangement and Romilly, M.R., held that "it may be a very proper thing that the influence of the father should be exercised so as to induce an elder son to make a proper and permanent settlement, when he comes of age, for the benefit of the family," p. 608.

mind."[13] Farwell, J., in *Powell* v. *Powell* may also be quoted: "On the authorities it appears to me not to be a question of actual pressure, or deception, or undue advantage, or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption, and must be rebutted by the donee."[14] He adopted the words[15] of Bowen, L.J., in *Allcard* v. *Skinner*: "This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play." Undue influence does not negative consent by the donor. Equity acts because there is want of conscience on the part of the donee, not want of consent on the part of the donor.

The relationship of solicitor and client was first made subject to the doctrine of undue influence so as to nullify a gift by Thurlow, L.C., in *Welles* v. *Middleton*.[16] In an earlier case Hardwicke had set aside a gift from a client giving as one of his reasons "the great power and influence that an attorney has over his client,"[17] but the attorney had taken advantage of his client's distress: it was really a case of imposition. Gifts made *pendente lite* had been set aside[18] before *Welles* v. *Middleton*, but there the donee was employed simply as a general legal adviser. In holding that he could not take a gift, Thurlow, L.C., said: "There would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it were not so: but once extricate him and it may be otherwise."[19] This reasoning from the existence of influence in the professional relationship has been repeatedly adopted. "The solicitor is considered to have an amount of influence over the mind and action of his client which, in the eye of this court, while that influence remains, makes it almost impossible that the gift can prevail. The principle of influence vitiates the gift."[20] In *Morgan* v. *Minett*,[21] Bacon, V.C., said: "You cannot inquire how much influence there was; it is enough, in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused." In the often quoted case of *Wright* v. *Carter*[22] the principle is explained on the same lines.

[13] *Turner* v. *Collins*, 7 Ch. App. 329, 339, 340, *per* Hatherley, L.C.
[14] [1900] 1 Ch. 243, 246.
[15] (1887), 36 Ch.D. 145, 190.
[16] (1784), 1 Cox 112, aff. H.L.
[17] *Walmesley* v. *Booth* (1739), 2 Atk. 27, 29.
[18] *Drapers' Co.* v. *Davis* (1742), 2 Atk. 295; *Saunderson* v. *Glass* (1742), 2 Atk. 296.
[19] 1 Cox 112, 125.
[20] *Re Holmes' Estate* (1861), 3 Giff. 337, 345, *per* Stuart, V.C.
[21] 6 Ch.D. 638, 647.
[22] [1903] 1 Ch. 27, C.A.

Other special relationships need only be briefly noticed as the same reasoning has been applied to them as to the parent and child and solicitor and client cases. A spiritual adviser was held to be within the principle in the leading case of *Huguenin* v. *Baseley*. Romilly's argument has been widely accepted[23]: "The relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another; and this case discovers one of a very peculiar nature: influence obtained through the sacred character of a minister of religion." In *Nottidge* v. *Prince*,[24] Stuart, V.C., declared that "No person who stands in a relation of spiritual confidence to another so as to acquire a habitual influence over his mind can accept any gift or benefit from the person who is under the dominion of that influence, without the danger of having the gift set aside." In a familiar case of spiritual influence, Cotton, L.J., explained that the court interferes "to prevent the relations which existed and the influence arising therefrom being abused."[25] Cottenham, L.C., adopted Romilly's argument when the rule was, for the first time, extended to cover a doctor who had procured an agreement "by some dominion exercised over his patient."[26] Where two engaged persons were concerned, Langdale, M.R., treating it as a "case of first impression," held that the court "will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used."[27]

In addition to special relationships known by a particular designation the rule applies where there is a personal influence, arising from the general circumstances, which has been used to benefit the dominant party. The influence must here be proved; it is not presumed. Hardwicke in *Bennet* v. *Vade*[28] found that there were "strong proofs of the defendant's power and influence over" the other party, that the defendant "had got an entire influence over him"; this was the main ground for setting aside a conveyance. *Bridgman* v. *Green*[29] is the leading case of influence existing *de facto*. A master was completely dominated by his

[23] (1807), 14 Ves. 273, 285, 286.

[24] (1860), 2 Giff. 246, 269.

[25] *Allcard* v. *Skinner*, 36 Ch.D. 145, 171. Kekewich, J., in the court below, said, "The law does not exclude influence. . . . But the law requires that influence, however natural and however right, shall not be unduly exercised," pp. 157, 158.

[26] *Dent* v. *Bennett* (1835), 7 Sim. 539, 4 My. & Cr. 269, 277.

[27] *Page* v. *Horne* (1848), 11 Beav. 227, 236. Followed by Maugham, J., in *Re Lloyds Bank Ltd.*, [1931] 1 Ch. 289.

[28] (1742), 2 Atk. 324, 326. At this date there was no presumption of influence although the defendant was an apothecary, as appears from a MS. report: Hardwicke Papers, B.M., Add. MSS. 36,016, p. 38a.

[29] (1755), 2 Ves Sen. 627, aff. Wilmot, 58.

butler who was treated as a confidential friend; a mass of evidence, including proof that the servant had induced the master to separate from his wife, established that influence existed. Hardwicke set aside a conveyance obtained by the servant "under the influence he had gained." Wilmot, C.J., affirmed the decision, as one of the Lord Commissioners, in an elaborate judgment. Holding that the master was "quite in a state of vassalage" to the butler he declared[30] that the court would interpose where "the donor is in such a situation with respect to the donee, as may naturally give him an undue influence over him." This wide extension of the principle has been thus described with the approval of the Court of Appeal: "Where those relations exist, by means of which a person is able to exercise a dominion over another, the Court will annul a transaction, under which a person possessing that power takes a benefit, unless he can shew that the transaction was a righteous one. It is very difficult to lay down with precision what is meant by the expression 'relation in which dominion may be exercised by one person over another.' That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated, that one may obtain considerable influence over another."[31] Where a young man was under the ascendancy of an older and more experienced friend who encouraged him in extravagant living a voluntary settlement was set aside.[32] In *Morley* v. *Loughman*[33] the donee was placed in charge of the donor, a person of weak mind though of full capacity, managed all his affairs, and converted him to his own religious sect. Wright, J., annulled a gift "obtained by the exercise and abuse of personal influence and ascendancy established and maintained for that very purpose, under a cover of religion and religious brotherhood." He did not base his decision on the narrower ground of a relationship to spiritual adviser and devotee.

In some instances of *de facto* influence the dominant and weaker party are related to each other by blood or in other ways. But the presence of influence must nevertheless be proved as the

[30] Wilmot, 61.

[31] *Per* Romilly, M.R. (1851), *Cooke* v. *Lamotte*, 15 Beav. 234, 240, approved *Berry* v. *Glazebrook*, 7 T.L.R. 574. In *Fowler* v. *Wyatt* (1857), 24 Beav. 232, 237, Romilly, M.R., said, "Wherever the Court finds one of two persons exercising undue influence over the other, it will not allow a transaction resulting from or produced by it to stand. The relevancy of the relation of parent and child, guardian and ward, and the like, in such cases, is this: that from that relation it flows, as a necessary consequence, that a considerable degree of influence must exist, and if unduly exerted, then this Court interferes."

[32] *Cavendish* v. *Strutt*, 19 T.L.R. 483, following *Smith* v. *Kay*, 7 H.L. 750.

[33] [1893] 1 Ch. 736, 756.

family relationship is not on the same footing as parent and child. It is only a circumstance to be taken into account in determining if influence exists. The question has arisen where the parties were nephew and aunt.[34] Where an elder sister had "acquired a great ascendancy and influence over" a younger, Langdale, M.R., said[35] the influence "may be used, for good or for evil" and avoided a settlement for the elder's benefit. Brother and sister[36] and two brothers[37] have been concerned. Where a stepfather was concerned[38] the question asked was whether the benefit "was obtained by the undue exercise of influence of the stepfather." There is no presumption of undue influence in the case of husband and wife and there seems to be no actual decision[39] in which a husband's influence has been proved *de facto*, though dicta suggest that the burden of proof is not a heavy one in this instance. Hardwicke said[40] that where a wife's assignment benefits not a stranger but her husband "a Court of Equity will have more jealousy over it; and, therefore, if there is any proof that the husband had any improper influence over the wife in it by ill, or even extraordinary good, usage, to induce her to it, the Court might set it aside." The Privy Council has declared[41] that "It may be true that in some cases it is easy for the wife to discharge the onus which lies on her as on every one else outside the protected classes to show that a particular contract was, in fact, procured by the undue influence of her husband."

There has been a consistent enunciation of the doctrine of undue influence since it was first introduced. In all cases of its operation there is genuine consent but the parties stand towards each other in a relationship which involves influence. In the protected classes (which are fairly closely defined) the influence, ascendancy, or domination is presumed and the influencer must prove the righteousness of the transaction. In the other cases (where there may or may not be a family relationship) the influence, ascendancy, or domination must be proved. Undue influence is the misuse, the abuse, of influence. It is influence which is unduly exercised.

[34] *Cooke* v. *Lamotte* (1851), 15 Beav. 234.
[35] *Harvey* v. *Mount* (1845), 8 Beav. 439, 447.
[36] *Sharp* v. *Leach* (1862), 31 Beav. 491.
[37] *Sercombe* v. *Sanders* (1865), 34 Beav. 382.
[38] *Kempson* v. *Ashbee*, 10 Ch. App. 15, 21, *per* James, L.J.
[39] *Talbot* v. *Von Boris*, [1911] 1 K.B. 854, C.A., was a case of a husband's duress.
[40] *Grigby* v. *Cox*, 1 Ves. Sen. 517, 518.
[41] *Per* Lord Atkin, *MacKenzie* v. *Royal Bank of Canada*, [1934] A.C. 468, 475. See also the remarks of Alverstone, L.C.J., in *Howes* v. *Bishop*, [1909] 2 K.B. 390, 396, 397, C.A., and Russell, J., in *Shears & Sons Ltd.* v. *Jones*, 128 L.T. 218, 221.

2. Undue Influence and Wills: Coercion

Lord Penzance in the Court of Probate was certainly making an understatement when he said of undue influence: "It is very doubtful whether the same meaning is attached to those words in the Courts of Equity. In testamentary causes it is always defined as coercion or fraud, but *inter vivos* no such definition is applied."[42]

The Ecclesiastical Courts adopted the Chancery expression in the early part of the nineteenth century but gave it a new meaning. In respect of wills it was made equivalent to what has been variously described as importunity, pressure, constraint, restraint, fear, compulsion, and coercion. There is a surfeit of synonym in the old and the modern cases. In *Hacker* v. *Newborn*[43] it was held by the Upper Bench that "if a man make his will in his last sickness, by the over-importuning of his wife, to the end he may be quiet, this shall be said to be a will made by constraint and shall not be a good will." In 1752 the Prerogative Court refused probate of a will made by the "pressure and importunity" of the testator's wife.[44] When "undue influence" made its appearance in the Ecclesiastical Courts its significance is clearly explained. In *Williams* v. *Goude*, [45] Sir John Nicholl admitted a will which was claimed to have been wrongfully obtained by the testator's wife, saying that "The influence to vitiate an act must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act: further, there must be proof that the act was obtained by this coercion —by importunity which could not be resisted;—that it was done merely for the sake of peace—so that the motive was tantamount to force and fear." Parke, B., in several Privy Council probate appeals explained undue influence by the analogy of common law duress: "The undue influence, and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress"[46]; "The deceased did not sign it of her own free will, but by the undue influence and continued importunities of her husband, exercised towards her when upon her death-bed and

[42] *Parfitt* v. *Lawless*, L.R. 2 P. & D. 462, 465, during argument.
[43] (1654), Style, 427.
[44] *Lamkin* v. *Babb*, 1 Lee 1, 9.
[45] (1828), 1 Hagg. Ecc. 577, 581. In *Constable* v. *Tufnell* (1833), 4 Hagg. Ecc. 465, 485, the same judge said, "If importunity is to vitiate the instrument, the importunity must be proved, and proved to be of such a nature and degree that the deceased was unable to resist it—that his free-will and free-agency were destroyed, and that he acquiesced only for peace."
[46] *Barry* v. *Butlin* (1833), 2 Moo.P.C. 480, 484.

incapable of resisting it; such importunity destroying her agency, and amounting to a species of duress"[47]; "That species of duress which is commonly called undue influence."[48]

The leading case of *Boyse* v. *Rossborough*[49] confirms the new meaning. Lord St. Leonards, in delivering the judgment of the House of Lords, referred to "the difficulties of defining the point at which influence over the mind of a testator becomes so pressing as to be properly described as coercion" and held that "influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened."[50] Thus, undue influence for the purposes of the Court of Probate is wider than common law duress but narrower than undue influence in equity. It is coercion. Like common law coercion—duress—it negatives true consent. Unlike chancery undue influence it does not operate in spite of consent. Although some of the definitions go so far as to include fraud under the head of undue influence it is now settled[51] that a plea of undue influence only raises the issue of coercion; fraud in obtaining a will must be separately pleaded.

The undue influence alleged in *Boyse* v. *Rossborough* was that by a wife over her husband but it is clear that there is no presumption of influence over a testator even if he is a member of one of the protected classes known to equity. A few years before the leading case the Court of Appeal was asked[52] to extend its doctrine to wills by declaring that a solicitor who had benefited under a client's will which he had drafted was a trustee for the next of kin and heir. It was said to be the first instance[53] of such a case, and Turner, L.J., felt "some alarm at the consequences of the doctrine contended for," as he said that if it could be applied to the relation of solicitor and client, it must be applied to that of guardian and ward. The declaration was refused. Knight Bruce, L.J., explained[54] that the testator "meant to do what he did, and there is, I think, a total absence of evidence

[47] *Baker* v. *Batt* (1838), 2 Moo.P.C. 317, 329.

[48] *Browning* v. *Budd* (1849), 6 Moo.P.C. 430, 435. See also Dr. Lushington in *Stulz* v. *Schaeffle* (1852), Prer. Ct., 16 Sur. 909, pp. 910, 911 and 918.

[49] (1857) 6 H.L.2.

[50] *Ibid.*, 48, 49.

[51] *Parfitt* v. *Lawless*, L.R. 2, P. & D. 462.

[52] *Hindson* v. *Weatherill* (1854), 5 De G. M. & G. 301, reversing Stuart, V.C.

[53] *Per* Turner, L.J., *ibid.*, 313. But in *Raworth* v. *Marriott* (1833), 1 My. & K. 643, 645, Leach, M.R., had assumed that the doctrine did not apply.

[54] 5 De G. M. & G. 311.

to show that his intention in that respect was unfairly caused, unduly procured, or improperly induced. . . . It being impossible that a testamentary gift by a client to a solicitor can against the latter be liable to all the same considerations as a gift to him *inter vivos* would have been." A spiritual adviser, also, is not treated differently from any other devisee or legatee. In a case[55] in which a Catholic priest, who was the testator's confessor and manager of his temporal affairs, was allowed to benefit, Abinger, L.C.B., said: "I do not think that mere influence is enough to set aside a will. . . . It must be such a degree of influence, if you choose to call it by that name, as deprives the testator of being the proper master of his own faculties. A degree of influence arising from strong fear and from threats or menace, would, I think, be undoubtedly sufficient." In *Parfitt* v. *Lawless*[56] where a Catholic priest, who was the testatrix's resident chaplain and confessor, took under the will there was held to be no evidence of undue influence to go to a jury. Lord Penzance said that "the influence which is undue in the case of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the Courts of Equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence." He went on to remark that "undue influence as a term used in a plea in this court raises the question of coercion, and that only." As Sir P. J. Wilde had declared in a previous case,[57] "Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened."

The onus of proving coercion is on those who allege it.[58] The character of the devisee or legatee in relation to the testator is only a minor factor to be taken into account in establishing

[55] *Middleton* v. *Sherburne*, 4 Y. & C. 358, 389, Court of Exchequer in Equity.
[56] L.R. 2, P. & D. 462, 469, 470.
[57] *Hall* v. *Hall*, L.R. 1, P. & D. 481, 482.
[58] *Parfitt* v. *Lawless*, L.R. 2, P. & D. 462; *Ashwell* v. *Lome* (1850), reported L.R. 2, P. & D. 477, in which Sir Jenner Fust held that the onus lay on a doctor who benefited, can be taken as overruled, unless he was also the preparer of the will. See *infra*.

coercion. But it may have some bearing on the question. It has been said[59] that if a man were "under the influence of such a superstitious terror or delusion as that he might think it necessary to his salvation that he should give all his money to his priest or confessor" it might be sufficient to set aside a will. Where the testatrix lived in a convent and benefited the nuns the jury found that the will was procured by undue influence; the Court of Appeal[60] refused to disturb their findings, Lindly, L.J., saying: "They may probably have regarded the testatrix as a person of so weak a mind as to be really coerced by the influence of the nuns." Undue influence has been proved against a doctor,[61] the test being, was the will made "in quiet submission in order to gain peace, and that the motive influencing her was force and fear? If so, that was sufficient to establish undue influence."[62] So it is clear that in all cases "to be undue influence in the eye of the law there must be—to sum it up in a word—coercion."[63]

There is another rule concerning wills which must not be confused with undue influence in any of its senses. If a person who prepares a will or who is responsible for its preparation benefits thereunder, it is treated as a suspicious circumstance and the court will refuse probate if not convinced that the testator understood what he was doing. Although the preparer of a will which is questioned on this ground is usually a solicitor it is not necessary to talk of undue influence. The rule is an independent one of ancient origin. Sir John Nicholl[64] compared it to the rule in Roman law by which *Qui se scripsit heredem* could take no benefit. He held that although in English law there was no absolute prohibition "his conduct must be watched as that of an interested person . . . *a fortiori* in a case where he is the confidential attorney of the deceased." A solicitor has been allowed to benefit in a case where "notwithstanding the suspicion, the balance of the testimony was sufficient to support the will."[65] In *Barry* v. *Butlin*[66] it is laid down that although the onus which is in all cases imposed on the party who propounds a will, is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents are presumed,

[59] *Per* Abinger, L.C.B., *Middleton* v. *Sherburne*, 4 Y. & C. 358, 390.
[60] *Hampson* v. *Guy*, 64 L.T. 778, 779.
[61] *In re Barlow*, [1919] P. 14; C.A., 131.
[62] *Per* Swinfen Eady, M.R., S.C. 35, T.L.R. 326.
[63] *Per* Sir James Hannen, *Wingrove* v. *Wingrove*, 11 P.D. 81, 82.
[64] *Paske* v. *Ollat* (1815), 2 Phill. Ecc. 323, 324; *Billinghurst* v. *Vickers* (1810), 1 Phill. 187. See also *Baker* v. *Batt*, 2 Moo. P.C. 317, 321, *per* Parke, B.
[65] *Wyatt* v. *Ingram* (1828), 3 Hagg. Ecc. 466, *per* Lyndhurst, L.C., supporting on petition for review the High Court of Delegates, reversing the Prerogative Court.
[66] 2 Moo.P.C. 480, 484.

"it cannot be that the simple fact of the party who prepares the will being himself a legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the court to pronounce against the will unless additional evidence is produced to prove the knowledge of its contents by the deceased." Parke, B., continues: "All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the circumstances of each particular case." If the rule is no more severe than this, then the client has less protection than is given to him by the presumption of undue influence in *inter vivos* transactions. Lord Hatherley in *Fulton* v. *Andrew*[67] goes further saying: "There is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction." Whatever the exact stringency of the rule may be, it supplements the probate law of undue influence where the beneficiary is also the preparer of the will. It has been applied in a case where the preparer of the will was the testator's doctor.[68] But the rule is not, and has never been, based on undue influence, even where the testator is a member of one of the protected classes known to equity.

It is unfortunate that the Court of Probate has not maintained its distinctive terminology as it has maintained its distinctive rules. If undue influence means coercion there is no reason why it should not be the accepted term. There is a long line of authority for coercion or some similar word to express a rule which is far older than the equitable doctrine of undue influence.[69]

3. Duress, Compulsion, Pressure

(*a*) *Common Law.* Common law duress being restricted to force and personal restraint, or the threat of such, has been supplemented by equitable principles. But common law itself gives a remedy on wider grounds than duress in the action for money had and received. If money has been paid under compulsion it may be recovered, though common law refuses to declare void an agreement made under the same kind of compulsion.

[67] L.R. 7, H.L. 448, 472. In *Finny* v. *Govett*, 25 T.L.R. 186, 188, C.A., Cozens Hardy, M.R., said, "He was unable to hold that the plaintiff had discharged the onus cast upon him by the law of showing the righteousness of the transaction, or that this paper propounded did express the true will of the deceased."

[68] *Greville* v. *Tylee*, 7 Moo. P.C. 320, judgment by Dr. Lushington. Nothing is said of showing the righteousness of the transaction.

[69] See *Swinburne on Wills*, 1611, ed. VII (5), (6).

What has been called compulsion,[70] duress of goods,[71] coercion,[72] and pressure,[73] is remediable if money has actually been paid over as a result of its exercise.

The leading case on the subject is *Astley* v. *Reynolds*[74] in which a pawnee refused to give up goods pawned unless the pawnor paid a sum in excess of the interest due; the pawnor paid and successfully brought *indebitatus assumpsit* to recover the excess charge, as it was "a payment by compulsion." The court refused to hold that because a bond could not be avoided by "duress of goods" the action failed; nor was the argument that the law had given him a remedy by action of trover accepted, because he "might have such an immediate want of his goods, that an action of trover would not do his business." The principle was explained by Abbott, C.J., in *Morgan* v. *Palmer*[75]: "It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'That which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing." It seems odd, if compulsion nullifies a payment, that it should not also nullify an agreement to pay. Nevertheless the law is settled[76] that the party exerting compulsion can sue on the agreement, i.e. legally recover what the law would not have let him retain if paid over in the first instance. The point was fully discussed in *Skeate* v. *Beale*.[77] It was argued that no distinction should be drawn between an actual payment and a written engagement to pay, and that it was probable that a party would be more cautious in making a payment than in writing a memorandum. But Denman, C.J., distinguished duress to the person and duress of goods: "The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the

[70] E.g. *Maskell* v. *Horner*, [1915] 3 K.B. 106, C.A.; *Astley* v. *Reynolds*, 2 Str. 915.

[71] E.g. *Skeate* v. *Beale*, 11 Ad. & Ell. 983; *Parker* v. *British & Exeter Ry. Co.*, 6 Ex. 702; *Atlee* v. *Backhouse*, 3 M. & W. 633 ("species of duress or constraint"); *Oates* v. *Hudson*, 6 Ex. 346 ("species of duress"); *Owen & Co.* v. *Cronk*, [1895] 1 Q.B. 265, C.A.

[72] E.g. *Cartwright* v. *Rowley*, 2 Esp.N.P. 723.

[73] E.g. *Maskell* v. *Horner*, [1915] 3 K.B. 106, C.A. In *Green* v. *Duckett*, 11 Q.B.D. 275, "extortion."

[74] (1731), 2 Str. 915.

[75] (1824), 2 B. & C. 729, 734, 735.

[76] See Parke, B., in *Atlee* v. *Backhouse* (1836), 3 M. & W. 633, 650; *Oates* v *Hudson* (1851), 6 Ex. 346, 348; and *Parker* v. *Bristol & Exeter Ry. Co.*, 6 Ex. 702, 705.

[77] (1840), 11 Ad. & Ell. 983.

law for a remedy: a man, therefore, is not bound by the agreement which he enters into under such circumstances: but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."[78] This reasoning would seem also to prevent recovery in actions for money had and received, but Denman, C.J., says, "the distinction between those cases and the present, which must be taken to be that of an agreement, not compulsorily but voluntarily entered into, is obvious." The agreement to pay can only be truly called voluntary if it is a genuine compromise[79] but it will usually not be. Further, in an action for money had and received there is "room for appeal to the law for a remedy," viz. an action of trover, yet another remedy is given, as was decided in *Astley* v. *Reynolds*. It was also said in that case that "where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again."[80]

It is interesting to note that the Indian Contract[81] Act has taken the logical step of treating duress of goods as negativing consent to an agreement by a provision which is far wider than anything in the English authorities on duress. Sir Frederick Pollock remarks that "In England the topic of duress at common law has been almost rendered obsolete, partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction under the head of undue influence."[82] Cases of pure duress are certainly rare at the present day and equity certainly interferes on a wider principle: whether that principle is undue influence or some other, is the question now to be discussed.

(*b*) *Equity*. In the leading case on the subject, *Williams* v. *Bayley*,[83] the term pressure is mainly relied on. There is little doubt that undue influence in its usual sense does not apply. A father successfully sought to rescind a mortgage which he had executed in favour of a banker, on proof that he had been frightened into this action by the banker's uttering to him, not a threat

[78] *Ibid.*, 990.
[79] Gurney, B., took this ground in *Atlee* v. *Backhouse*, 3 M. & W. 633, 652.
[80] *Per curiam*, 2 Str. 916.
[81] S. 14: "Consent is said to be free when it is not caused by—(1) coercion . . ." S. 15: "Coercion is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."
[82] Pollock & Mulla, *Indian Contract Act*, 6th ed., 92.
[83] L.R. 1, H.L.200.

but a warning, that he had it in his power to prosecute the son for forgery. The judgments of Cranworth, L.C., and Lord Westbury do not refer to undue influence but, in so far as they are not based on a consideration of public policy, they rest on the presence of pressure. Cranworth, L.C., referring to "this doctrine of pressure" said[84]: "It is not pressure in the sense in which a Court of Equity sets aside transactions on account of pressure, if the pressure is merely this: 'If you do not do such and such an act I shall reserve all my legal rights, whether against yourself, or against your son'," as distinct from an implied threat which he found to be present. Lord Westbury said[85] there were "two points of view, in which it may be regarded. One of them is, was the plaintiff a free and voluntary agent, or did he give the security in question under undue pressure exerted by the defendants? . . . Second . . . Was the transaction, taken independently of the question of pressure, an illegal one," by which he meant an agreement to stifle a prosecution. Lord Chelmsford held that "the agreement having been extorted from the father by undue pressure"[86] it ought to be set aside, but later in his judgment said that "the case comes within the principles on which a Court of Equity proceeds in setting aside an agreement where there is inequality between the parties, and one of them takes unfair advantage of the situation of the other, and uses undue influence to force an agreement from him."[87] It is clear that he is not using undue influence in its ordinary sense because that operates although there is true consent and even eagerness in the transaction, without anything in the nature of force, and he had previously explained that "the fears of the father were stimulated and operated on to an extent to deprive him of free agency, and to extort an agreement from him for the benefit of the bankers."[88] Undue influence is far removed from extortion. The principle of *Williams* v. *Bayley* is the equitable doctrine of pressure and there is no reason to explain it by undue influence, used only by Lord Chelmsford, casually, and in a peculiar sense. The doctrine is well described by Stuart, V.C., in the court below: "Where a power of operating on a man's fears exists, and he enters into a contract unwillingly and under the influence of that power, its existence constitutes pressure."[89] The word influence here clearly has nothing to do with the doctrine of undue influence.

[84] *Ibid.*, 212; 209.
[85] *Ibid.*, 216.
[86] *Ibid.*, 214.
[87] *Ibid.*, 216.
[88] *Ibid.*
[89] *Bayley* v. *Williams*, 4 Giff. 638, 661.

There is good authority both before and after *Williams* v. *Bayley* for pressure as a word of art indicating a distinct equitable principle. *Collins* v. *Hare*[90] is a solitary case decided on the ground of undue influence in the sense of pressure. A deceased assignor left a letter stating that certain assignments were "extorted from me by Mr. C by threats and undue influence," C, a clerk in his employ, having it in his power to ruin his character and the credit of the house by exposing frauds in the accounts. "Undue influence" gained a footing in the case from its use by the party; the common law judge in Ireland, trying the feigned issue at law, told the jury they might find that the assignments "were obtained by undue influence"; and on appeal from the Irish Chancery, Lyndhurst, L.C., not freeing himself from the words which the deceased had speeded on their way, said that "the evidence was strongly in support of undue influence."[90a] There were obviously threats, express or implied, of a prosecution. In *Osbaldiston* v. *Simpson*[91] securities given by the plaintiff to prevent a prosecution of himself for cheating at cards were cancelled, Shadwell, V.C., holding that "the plaintiff was induced to give the notes in consequence of his fears being wrought upon."[92] He does not mention undue influence. In *Ormes* v. *Beadel*[93] an agreement was entered into by a builder with a debtor under a threat by the latter that he would not otherwise pay what was due: he knew that the builder was in urgent need of money to pay his complaining workmen who had refused to continue work without their wages. Stuart, V.C., set aside the agreement, holding that "Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it, this court will set it aside."[94]

Subsequent cases leave uncertain the extent of the principle of pressure or coercion in equity. Romilly, M.R., attempted a generous definition: "Coercion takes an infinite number or forms, but it may properly be thus defined: the moment that the person who influences the other does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have

[90] (1828), 1 Dow. & Cl., H.L. from the Ir. Ct. Ch., 139.

[90a] *Ibid.*, 150, during argument. But he later said, "All that the Equity Court had to do was to be satisfied that justice had been done . . . the substantial question on the issue was fraud or no fraud." The judgment proceeds on this basis.

[91] 13 Sim. 513 (1843). See also *Dewar* v. *Elliott* (1824), 2 L.J. o.s. Ch. 178.

[92] *Ibid.*, 514.

[93] 2 Giff. 166 (1860).

[94] *Ibid.*, 174. (Cp. the same judge's statement of the law of pressure a few years later in *Williams* v. *Bayley*, supra p. 111.) The decision was reversed by Campbell, L.C., but "most reluctantly," on the ground that the plaintiff had acted on the voidable agreement, 2 De G., F., & J. 333, 337.

obtained, then it becomes coercion and it ceases to be persuasion or consideration."[95] He applied this definition, holding it to be "strictly coercion," where the trustees of a will threatened a beneficiary who took a leasehold interest thereunder that they would prevent the lessor, whose actions they could control, from granting a renewal of the lease unless the beneficiary agreed to pay certain debts and annuities for the benefit of other persons who took under the will. The agreement of the beneficiary thus procured was set aside.[96]

If the threat by which pressure is exerted is a threat to prosecute for a criminal offence the contract thereby procured may be void at common law also, on the ground of illegality. This will be so if the contract amounts to an agreement not to prosecute. Thus where a forged bill was ratified by the forger's brother-in-law in consideration that there should be no prosecution the agreement was condemned at common law as it was "against public policy and void, as founded upon an illegal consideration."[97] On the other hand where[98] there was found to be no agreement to abstain from a prosecution a warrant of attorney given to secure a debt was not declared void by a Common Law Court although "the plaintiff held out threats of prosecution in order to induce the defendant to give the security for the debt."[99] This decision has been followed by the Court of Appeal which held that the principle of law laid down in *Williams* v. *Bayley* does not prevent a creditor from taking security for his debt by lawful means and that "a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt."[100] In a case[101] after the Judicature Act, which did not concern a transaction between debtor and creditor, the rule against stifling a prosecution was not relied on, yet promissory notes were declared unenforceable in the following circumstances. The defendants gave promissory notes to the trustee in bankruptcy of C, in payment of an alleged purchase by them of the

[95] *Ellis* v. *Barker* (1870), 40 L.J.Ch. 603, 607.

[96] *Ibid.*, p. 608, Romilly, M.R., incidentally remarks that the plaintiff "was unduly influenced to bind himself by deed to do what was required." The decision was affirmed, L.R. 7, Ch. App. 104, but on the ground of breach of duty by the trustees.

[97] *Brook* v. *Hook*, L.R.6, Ex. 89, 99.

[98] *Ward* v. *Lloyd*, 7 Scott N.R. 499.

[99] *Ibid.*, *per* Tyndal, C.J., 504. Coltman, J., said, "It is true there was a threat used by the plaintiff, and that that threat may have operated on the mind of the defendant . . . yet, in the absence of agreement" there was "no ground for setting it aside," 505.

[100] *Flower* v. *Sadler*, 10 Q.B.D. 572, *per* Cotton, L.J., 576. See also Brett, L.J., 575, and Coleridge, L.C.J., 573.

[101] *Seear* v. *Cohen*, 45 L.T. 589. Denman, L.C.J., said, p. 590, that if stifling a prosecution were the sole ground "it might be I should like to hear the evidence in the case more fully discussed."

bankrupt's stock in trade, under a threat of criminal proceedings against C who was the son of one and the nephew of the other defendant. Denman, L.C.J., said[102]: "The transaction is not a fair one. It is not to be looked at as a voluntary act, but as a case of extortion . . . the contract is not enforceable in equity, and the defence of duress is a good one"; it made no difference whether or not there were any real grounds for a prosecution as "the defendants were not free agents, but were coerced and forced into the bargain."

Further cases in the Chancery Division distinguish agreements to stifle a prosecution and agreements induced by pressure. Although a contract may be open to both objections it is necessary to maintain the distinction. In *Davies* v. *London & Provincial Marine Insurance Co.*,[103] Fry, J., allowed recovery of a sum of money that had been deposited with trustees as security for money due to a company from its agent against whom there were thought to be charges of felony pending. Basing himself on *Williams* v. *Bayley*, Fry, J., said that "illegality resulting from pressure and illegality resulting from an attempt to stifle a prosecution do not fall within that class of illegalities which induces the court to stay its hand, but are of a class in which the Court has actively given its assistance in favour of the oppressed party, by directing the money to be repaid.[104] Referring to the maxim *in pari delicto melior est conditio defendentis*, he said, "there is great difficulty in applying that principle to a case where money has been placed *in medio*, where the Court must do something with it, or else leave it to be locked up for ever," even assuming that the contract was illegal as compounding a felony. In another case of stifling a prosecution, Fry, J., ordered the return of securities which had been placed *in medio* in the hands of trustees, stressing the fact that there was "that amount of pressure put upon Mrs. A which always arises where there is a prosecution against a near relative or friend of the person who enters into the bargain."[105] This was a case of a wife who charged her separate property with loss caused by her husband's defalcations: in the previous case they were merely friends who were ready to make good the loss. The necessity of proving pressure as well as illegality if equitable relief is to be given was brought

[102] *Ibid.*, 590, 591. Huddleston, B., and Hawkins, J., gave judgment to the same effect.

[103] 8 Ch.D. 469. But the main ground of the decision was non-disclosure of material facts in a contract of suretyship. "Undue influence" is not mentioned.

[104] *Ibid.*, 477.

[105] *Whitmore* v. *Farley*, 43 L.T. 192, 197, Aff. C.A. 14 Cox C.C. 617; 29 W.R. 825. "Undue influence" is not mentioned.

out in a case[106] in which pressure was held not to be proved. Lindley, L.J., said that a plaintiff "in order to obtain relief in equity must prove not only that the transaction is illegal, but something more: he must prove either pressure or undue influence."[107] Bowen, L.J., was not satisfied that, if there were an agreement not to prosecute, "it would not properly follow as an inference of fact that there was undue influence and pressure."[108] In this dictum which, on the point of substance, is against the weight of previous decisions, undue influence and pressure seem to be treated as identical. It is one of the rare appearances of the phrase where pressure of prosecution is under discussion and is a departure from general usage. In *McClatchie* v. *Haslam*,[109] an agreement not to prosecute and pressure were both negatived on the evidence, with the result that a wife was not allowed to avoid a security given to her husband's employer for money which had been misappropriated. Lindley, L.J., described the action as one to set aside a security on the ground that "it was given under pressure; that is to say, threats of legal proceedings —criminal proceedings."[110] In *Barnes* v. *Richards*[111] where the jury had found that a settlement between employer and manager was not induced by threats of criminal proceedings for errors in the accounts, Alverstone, L.C.J., held that a further finding of "undue pressure" was not sufficient in law to nullify the agreement: the only possible pressure in law for the avoidance of the agreement was a threat to prosecute and this did not exist. In *Kaufman* v. *Gerson*[112] an agreement executed by a wife to prevent the prosecution of her husband was declared void expressly on the ground of "coercion" or "pressure." The ground that a prosecution had been stifled was not relied on but the case was decided "on the broad general principle that the Court will not enforce a contract which has been obtained by means of such moral coercion as was here used."[113]

[106] *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587; [1892] 1 Ch. 173, C.A.

[107] *Ibid.*, 182.

[108] *Ibid.*, 186. "Undue influence" is not mentioned by Fry, L.J., or Williams, J., in the court below.

[109] 65 L.T. 691, C.A.

[110] *Ibid.*, 692. "Undue influence" is incidentally mentioned by Lindley, L.J., in one part of the judgment but pressure is used throughout. Fry, L.J., again avoids the use of "undue influence" which Bowen, L.J., employs once in his judgment.

[111] 18 T.L.R. 328. "Undue influence" unfortunately appears in the headnote but nowhere in the judgment which refers to "pressure" alone.

[112] [1904] 1 K.B. 591.

[113] *Ibid.*, 599, *per* Collins, M.R., who uses both "pressure" and "coercion." "Undue influence" is not mentioned in C.A., but Wright, J., in the court below said the agreement "was obtained by the undue influence or duress of a threat to prosecute." ([1903] 2 K.B. 119.)

The decision in *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.*[114] discards the well established terms pressure and coercion in favour of undue influence. There was no direct threat by the plaintiffs to prosecute X for forgery but a private company, whose directors were the father and brother of X, gave a guarantee which the plaintiffs knew would not have been given but for the desire to prevent a prosecution. The guarantee was held not to be binding. The father was not aware of the possibility of a prosecution and the brother, if he alone had been concerned, would not have cared whether his brother were convicted or not, but he feared the effect on his father's health in the event of a conviction. Porter, J., said[115]: "If the known object was to prevent the prosecution of his brother for whatever reason, that, I think, is enough." The extent of the protection given by this application of the principle of pressure is not certain, but it seems that it is not confined to cases where the persons involved are the relatives of the alleged criminal. Protection has been given where "friends" as distinct from relatives were involved[116] and Porter, J., ruled that: "It is not necessary to determine the exact bounds beyond which the doctrine would not be applied, but I should myself be inclined to say that it extended to any case where the persons entering into the undertaking were in substance influenced by the desire to prevent the prosecution or possibility of prosecution of the person implicated, and were known and intended to have been so influenced."[117]

That there need be no direct threat for equity to interfere is shown in *Wheeler* v. *Sargeant*[118] where pressure appears in new surroundings. It was held that money paid to an executor by a beneficiary, in fulfilment of what was held to be a gratuitous promise to the executor, could be reclaimed. Romer, J., said[119] that "the Court will look with suspicion on such a transaction between executor and beneficiary, and will not uphold it save under exceptional circumstances—circumstances which negative any suspicion of misrepresentation, pressure, or unfairness, on the part of the executor . . . though there were no threats of any kind by the defendant, I think there was pressure in fact on his part, though not appearing in any form of words employed by him. His very position gave him the opportunity of putting pressure on the beneficiaries . . . I think that this document

[114] [1937] 2 K.B. 389.
[115] *Ibid.*, 396.
[116] *Davies* v. *London & Provincial, etc., Co.*, 8 Ch.D. 469, *supra*, p. 114.
[117] [1937] 2 K.B. at p. 396.
[118] [1893] 69 L.T. 180.
[119] *Ibid.*, 183.

was signed by the plaintiff partly from the fear that if he did not sign it, it would be the worse for him, owing to the defendant's position." Pressure is here used to cover what is somewhat similar to breach of duty by a trustee who seeks to profit by his trust. The decision may be regarded as an illustration of the tendency in equity to treat an executor in the same way as a trustee and as liable to the obligations attending a fiduciary position. If pressure be an instance of undue influence it is remarkable that the latter phrase is not used here: not even breach or abuse of confidence is relied on.

Whatever the limits of the doctrine of pressure the weight of authority is decidedly against describing it as undue influence and in favour of calling it pressure or coercion. This form of coercion has arisen chiefly where there are threats express or implied of criminal proceedings. There has been no case, for example, in which the compulsion by duress of goods which is sufficient in an action for money had and received has been held by equity to nullify an agreement. For this reason coercion in equity may be said to be narrower in its scope than testamentary coercion which covers many other threats than those of criminal proceedings. Further, a testator subjected to coercion is frequently on a sick bed and in an enfeebled state and not able to resist importunity which would not affect a man of ordinary firmness. Yet it is clear that a weak state of resistance may be taken into account in deciding whether his consent was coerced.[120] This is also the case where consent to marriage is in question.[121] Coercion seems to be the accepted term in the Divorce Court for a forced consent to marriage[122]; it is used in cases where the threats would have amounted to duress at common law.[123] Marital coercion is a familiar title in criminal law. In Admiralty there is a preference for the term compulsion.[124] The Admiralty principle was explained in *The Mark Lane* where a salvage agreement for an exorbitant amount was impeached as there were reasonable grounds for believing that the ship in distress would be abandoned unless the sum were agreed to. Butt, J., said[125]: "It is true

[120] *Wingrove* v. *Wingrove*, 11 P.D. 81, 82; *Hampson* v. *Guy*, 64 L.T. 778, 780, C.A.

[121] *Scott* v. *Sebright*, 12 P.D. 21, 31, Butt, J.: "She had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion or threats which in her normal condition she would have treated with the contempt she must have felt for the man who made use of them."

[122] *Scott* v. *Sebright*, 12 P.D. 21; *Cooper* v. *Crane*, [1891] p. 377, in which Collins, J., refers to "the doctrine of coercion," *Hussein* v. *Hussein*, [1938] p. 159.

[123] In *Cooper* v. *Crane* and *Hussein* v. *Hussein*, *supra*, there was a threat, among others, to kill the lady unless she consented.

[124] E.g. *The Helen & George*, Swab. 368, *The Medina*, 2 P.D. 5, where "pressure" was also used, *The Inna* (1938), p. 157.

[125] 15 P.D. 135, 137.

that there is not in this case the amount of duress which would invalidate an agreement at common law, but in this Court the same amount of compulsion or duress—call it what you will—is not necessary to induce the Court to refuse to enforce an agreement. . . . The fact is the master of *The Mark Lane* signed this agreement under compulsion, and, the amount being exorbitant, I decline to uphold the agreement." Such relief is comparable to the relief given by equity to persons in distressed circumstances where advantage is taken of their distress to obtain an agreement.[126] In equity such relief is usually allowed on the ground of "inequality" or "imposition." This is distinguishable from coercion or pressure because the party is in a state of distress or necessity which is exploited: the other party has not caused the distress or issued a threat.

As coercion is used in testamentary and matrimonial cases, pressure seems the preferable term to describe the *Williams* v. *Bayley* doctrine of equity and there is, as has been seen, more authority in its favour. On the other hand, "pressure" is found in bankruptcy law with a not dissimilar meaning. It is an old rule that a preference of one creditor by the debtor is not a fraudulent preference for the purpose of bankruptcy proceedings if it is made under pressure.[127] The question whether there has been a fraudulent preference depends not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. Bankruptcy legislation has not abolished the rule. As Lord Cairns said[128]: "The Act appears to me to have left the question of pressure as it appears under the old law; and, indeed, the word 'preference,' implying an act of free will, would, of itself, make it necessary to consider whether pressure had or had not been used." A threat of criminal proceedings amounts to pressure for this purpose[129] though actual threats are not necessary if the debtor acts in an endeavour to save himself from a prosecution. As Halsbury, L.C., said, in the latter event: "It becomes then no longer a voluntary act, but an act under pressure—pressure not the less because it is pressure upon his own mind and his own consciousness—from an apprehension of what will happen if bankruptcy takes place; not a pressure by threats of

[126] E.g. *Fry* v. *Lane*, 40 Ch.D. 312.

[127] E.g. "pressure" is used by Lord Kenyon in *Smith* v. *Payne*, 6 T.R. 152, Lord Campbell in *Edwards* v. *Glyn*, 2 E. & E. 29, 46 ("This payment by the bankrupt was not a voluntary payment, but was made under what, in the legal sense of the word, may be called pressure"), Parke, B., in *Brown* v. *Kempton*, 19 L.J. (N.S.) C.P. 169, 170 ("The payment was made under the influence of the pressure and importunity of the defendant").

[128] *Butcher* v. *Stead*, L.R. 7, H.L. 839, 846.

[129] There was formerly some doubt on this point; see a useful note on the doctrine of pressure by the reporter, *Bayley* v. *Williams*, 4 Giff. 638, 663.

creditors to assert their rights."[130] But apparently a threat to bring an action is not pressure,[131] though "an earnest request by a creditor, although not accompanied by a threat or remonstrance or very positive demand, may be enough to deprive the payment of that voluntary character which would tend to make it impeachable"[132] as an undue preference.[133] Pressure in bankruptcy must be distinguished from what is usually called extortion,[134] which is yet another term implying unwillingness. If a creditor by means of bankruptcy proceedings, actual or threatened, extorts or attempts to extort, from a debtor some profit over and above his original debt, the court may dismiss his petition. "A debt which has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order."[135] But where the debtor proposed a contract which was more beneficial to the creditor than the dividend which he would have received in a bankruptcy, the court refused to treat it as a case of extortion.[136] Collins, L.J., said: "It is a question of policy, and the decided cases do not go so far as that; they go simply upon the question of extortion at common law; if the transaction is one of extortion it fails."[137] The rules of pressure and extortion in bankruptcy have a special function. They are not concerned with the absence of consent which avoids an ordinary transaction and are therefore not likely to be confused with the equitable doctrine of pressure.

In conclusion, it is submitted that undue influence has a clear meaning which is distinct from that of the multifarious words which imply absence of consent. Equity has fortunately avoided such terms as "constructive duress" and "equitable duress" and there is no reason why the term pressure should be replaced by that of undue influence. It is inaccurate to say[138] that the common law of duress has been superseded by undue influence: only when the latter term is used with reference to wills does it imply a consent that has been forced. When in a recent case it

[130] *Sharp* v. *Jackson*, [1899] A.C. 419, 426.
[131] *Per* Jessel, M.R., in *Ex p. Hall*, 19 Ch.D. 580, 585.
[132] *Per* Bacon, C.J.B., in *Ex p. Blackburn*, 12 Eq. 358, 363.
[133] *Ex p. Topham*, L.R. 8 Ch. App. 614.
[134] E.g. *Ex p. King*, 3 Ch.D. 461, C.A.; *Re Atkinson*, 9 Morrell 193; *Re Otway*, [1895] 1 Q.B. 812; *In re Shaw*, 83 L.T. 754.
[135] *Per* Rigby, L.J., in *In re Shaw*, 83 L.T. 754, 755.
[136] *Re Bebro*, [1900] 2 Q.B. 316, C.A.
[137] *Ibid.*, 324.
[138] Salmond & Winfield, *Law of Contracts*, 258, 259, quoted with approval by Porter, J., in *Mutual Finance Ltd.* v. *John Wetton & Sons Ltd.*, [1937] 2 K.B. 389, 394.

was said[139]: "For there to be undue influence there must be bullying or unconscionable persuasion leading to a position of influence such that the person using it could dominate the power of decision of the other person rendering that person incapable of resisting his will so that the consent given by the other person was not a real expression of intention," there was a bold and novel combination of the two notions of influence and coercion. In this case there seems to have been undue influence in its proper sense, exercised over a girl by her fiancé's father in whose house she resided and upon whom she was financially dependent. "It is for the law in its future development to reduce this general principle so far as possible to the form of specific rules in respect of divers methods of coercion."[140] Much has already been done in this direction but the past development of the law may be to little purpose if undue influence is not confined to its proper place.

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[139] Hawke, J., in *Wilson* v. *Dansie*, *The Times*, 19th February, 1938.
[140] Salmond & Winfield, *Law of Contracts*, 259, approved Porter, J., *cit. sup.*

THE EVOLUTION OF THE MODERN ENGLISH PRISON SYSTEM

IN the period following the centralisation of and unification of the English prison system opinion regarding the aims of that system may be observed to have passed through three stages. During the first phase deterrence and retribution were held to be its proper objects. This phase can be said to coincide with the so-called Du Cane régime, i.e. the period when the prisons of Great Britain were under the administration of Sir Edmund du Cane (1878 to 1894). Du Cane admitted the need for combining penal and reformative elements but in practice the place reserved for the reformation of the prisoners was exceedingly small. The first attack on this principle was made by the Gladstone Report (*Report from the Departmental Committee on Prisons*, 1895) which was to play a vital rôle in the further development of the British prison system.[1]

The second phase was that when the prison system was administered by Sir Evelyn Ruggles Brise (1895 to 1922) and it was recognised that apart from the function of deterrence and retribution the prisons should also exercise a reformatory influence. This reformative function was accepted as an important and essential feature of the prison system, but it was accepted as a distinctly secondary function.[2]

It is most noteworthy for the evolution which has taken place in this domain that the views presented by the above-mentioned Report in 1912–13 as those of "loose thinkers and loose writers"

[1] ". . . prison treatment should have as its primary and concurrent objects deterrence and reformation" and should be "effectually designed to maintain, stimulate or awaken the higher susceptibilities of prisoners . . . and whenever possible to turn them out of prison better men and women, both physically and morally, than when they came in." Report from the Departmental Committee on Prisons, 1895, para. 47, p. 18, and para. 25, p. 8.

[2] This point of view was very clearly expressed by the Annual Report of the Prison Commissioners for England and Wales (1912–1913). This Report states that if the aim of the prison system is to be retributory, deterrent and reformatory none the less, "the important thing is as to the order of precedence of the three attributes," and in this connection, the Report defines the issue more closely as follows: "If by 'retributory' is meant, not the vulgar and exploded instinct of vengeance or personal revenge, but the determination of the human consciousness that the system of rights shall be maintained and that he who offends against it shall be punished, and that the punishment shall be of such a nature as to deter him and others from anti-social acts; if by 'reformatory' is meant the accepted axiom of modern penology that a prisoner has reversionary rights of humanity and that these must be respected consistently with the due execution of the law, and that no effort must be spared to restore that man to society as a better and a wiser man and a good citizen—any inversion of these factors of punishment would be fatal; but among loose thinkers and loose writers the impression seems to be gaining ground that this historic order of the factors of punishment should be inverted, and that the object of punishment shall be altogether reformatory, as little as possible deterrent, and not at all retributory." Pp. 22–23.

are at present the dominant ones in England and what is more, shared by the persons responsible for the conduct of the prison system of that country. In the third and present phase, initiated after the War, the object of the prison system is based on the utilitarian and reformatory ideas. According to the concept dominant at present the sanction of privation of liberty should be carried out in such wise that as few prisoners as possible return to the prisons, and the method employed for the attainment of this object is to submit the delinquents to such action as may educate and prepare them for re-entry into social life (with the exception of course of those who are not susceptible to such re-education). The principle of deterrence and retribution is satisfied in the very fact of the apprehension of the offenders, the administration of a suitable punishment, and the depriving them of their liberty. A prison system based on the system of reformation of prisoners not only does not weaken discipline in the penitentiary and does not make their stay there a pleasant one, but presents to the prisoner a number of tasks which require an intensive effort on the part of the offender, one, too, which he makes only with the utmost difficulty.[3]

With this in view many and very diverse reforms are being effected in that country in the fields of prison administration, prison discipline and so on. Present-day English penitentiary

[3] The above dominant views on the objects of the prison system now current in England are brought out in high relief by the following passages culled from the Annual Reports of the Prison Commissioners for 1923 and for 1925.

"Since the offender has to return to ordinary life, take his place as a citizen, and earn his living at some time in the future, which is usually not far distant, our object is to fit him for those duties. The means to this end are fairly long hours of hard and steady work at an occupation which shall, if possible, give such industrial training as will enable him to earn a living; the removal of needless degradations and the encouragement of self-respect, and in the evenings, well considered education suitable for backward or unbalanced adults. To these are added visiting by voluntary workers of a strong character and personal influence, and, whenever possible, such measures of trust as will awaken a sense of personal responsibility. The prison day should be hard, but the object is not mere severity. It should be interesting, but the object is not to make it pleasant. The aim is to make a citizen by quickening and directing the activities of both mind and body." (*Annual Report*, 1923, p. 16.)

"Prisons exist to protect Society, and they can only give efficient protection in one of two ways, either (*a*) by removing the anti-social person from the community altogether, or for a very long period; or (*b*) by bringing about some change in him. Any general application of the first method would not be supported by public opinion. The prison administration must therefore do its utmost to apply the second, that is to say, to restore the man who has been imprisoned to ordinary standards of citizenship so far as this can be done within the limits of his sentence. Unless some use can be made of the period of imprisonment to change the anti-social outlook of the offender and to bring him into a more healthy frame of mind towards his fellow citizens, he will, on leaving the prison gates after a few weeks or months again become a danger or at any rate a nuisance. He may, indeed, be worse than before, if the only result has been to add a vindictive desire for revenge on society to the selfish carelessness of the rights of others which he brought into prison with him." (*Annual Report*, 1925, p. 17–18.)

policy is marked by clear ideological traits: everything that is done is directed towards a single end, and this is true not only of larger scale changes but also of everyday matters.

Understood thus prison reform appears to be the most difficult task lying within the sphere of penitentiary policy. The introduction of appropriate regulations has only secondary significance. The fundamental question is the elaboration and carrying into effect of such a system of treatment as may be efficacious in reforming the delinquents. Viewed in this light, the rôle of the prison system is seen not to be a mere matter of assuring that sentences are carried out; the sentence itself is only justified in so far as it forms a basis for reformative treatment. The problem of prison reform is shifted from the administrative field to the criminological and social one.

Because on the one hand prison reform in England is decidedly heading for such transformation of the system as would provide the best possible conditions for reformative action on the prisoners, while on the other really serious difficulties constantly occur in the practice of reformative action, the question arises as to what are the actual, concrete possibilities of the proposed reforms being carried out.

It seems to us, that in spite of all, there are real possibilities that the measures of penitentiary reform undertaken in England, may be successfully carried into effect. We shall list below factors which in England largely nullify the difficulties that block the path of every broadly conceived reform of the prison system aiming at the development of reformative influence on the prisoners; these factors indicate too that such reform in England has considerable chances of success.

(*a*) Public opinion in England is more and more interested in prison reform and increasingly appreciates the social and national significance of the problem. An interesting illustration of the change in the attitude of the public with regard to this matter is afforded by debates and discussions in Parliament and in the Press in recent years.

(*b*) English penal legislation also facilitates the realisation of penitentiary reform and removes a number of potent difficulties from its path. On the one hand, this legislation has adopted quite a number of indeterminate (relatively) sentences which, in the case of a certain category of delinquents, make it possible to apply reformative action for a longer period to them; on the other hand, the existing legislation has been supplemented by a number of sanctions supplanting short

term prison sentences (which as already stated are valueless from the point of view of reformative action).

(*c*) The work of penitentiary reform is facilitated not only by the penal legislation of the country, but also by the courts of justice, viz. by the manner in which they apply the methods of penal repression. We have shown (when studying the evolution of the system of sanctions) that the courts more and more often supplant short term sentences by the imposition of fines or by delivering sentences of probation sanctions (although *Criminal Statistics* has pointed out in several of its annual introductions as do also the Prison Reports for the last few years, that the courts still do not make full use of their powers in this respect).

(*d*) Another circumstance favouring the carrying out of prison reform is the present state and trend of criminality. The general increase in criminality during the last few years has undoubtedly been the result of an increase in the number of offences committed by youthful delinquents; an analysis of present-day criminality indicates that the more serious crimes are tending to decrease in number and that cases of serious professional criminality are relatively few. Both these features are characteristic of present-day criminality in England and both undoubtedly facilitate the carrying out of the reforms envisaged.

(*e*) The possibility of carrying out in England reforms of the kind indicated above depends largely on the number of prisoners. It should be borne in mind that reformative action is so costly and requires such a numerous and carefully selected personnel, penal establishments of such a high level of architectural excellence, so strict a classification of prisoners, and such individual treatment of them, that it is virtually impossible in overcrowded prisons. The average number of persons held in the prisons of England was in 1936 10,613. The figure is steadily decreasing (it had been 11,306 in 1935). Furthermore, it should be noted that these figures include prisoners held pending trial and civil process prisoners.

(*f*) Undoubtedly another positive factor is the very small number of persons held pending trial and the relatively small number of political prisoners. These two categories (obviously they are quite different in type) introduce many problems very difficult of solution in the field of penitentiary policy, particularly in those countries where such prisoners constitute a considerable proportion of the prison population.

(*g*) Under the English prison system, prisoners are housed in separate cells; the housing of several prisoners in a single cell is a very serious obstacle to proper reformative action.

(*h*) The English prisons operate a different system for a certain group of offenders, i.e. those aged 17 to 23 and sentenced by the courts to Borstal detention; the Borstal system undoubtedly contributes greatly to penitentiary reform with respect to other groups of offenders, since it constitutes a kind of "school," and involves the investigation of all the basic problems (mode of examining the personality of the prisoner, his classification, the segregation to be effected in the penal establishments, methods of influencing the prisoners and the organisation of post-prison welfare work). Penitentiary reform in general can profit by the experience gained by the working of the Borstal system, naturally taking into consideration all the differences existing between a prison system for adults and the Borstal system.

(*i*) Another feature favouring the introduction of penitentiary reform in England along the lines indicated is the fact that the prison system there has been developing constantly and along evolutionary lines; none of the reforms were effected in a sudden radical fashion which might have weakened the efficiency of the prison administration or demoralized the prison population.

(*j*) And last but not least the fact that the English prison system has been centralised has also undoubtedly facilitated prison reform, since this centralisation renders it possible to pursue a uniform penitentiary policy throughout the country. (But it must be pointed out that for a long time this centralisation was a hindrance to prison reform because every attempt to introduce a more rational classification of prisoners and prisons was regarded as having a weakening effect upon it.)

It may therefore be stated that although the transformation of the prison system in a spirit of the reformative execution of sanctions is on the whole an extremely difficult task (as in every prison system), there are in England quite a number of potent circumstances which largely facilitate the execution of such a penitentiary reform.

The transformation of the prison system in England is conceived very radically.

(*a*) First of all, the reformation of the offenders has been taken to be the principal object of imprisonment. The official

statement of this view constitutes an undoubted turning point in the evolution of English penal and penitentiary policies.

(*b*) The method of classifying prisoners solely according to penal criteria or administrative considerations is being more and more rapidly abandoned, and is being supplanted by the method of classification whereby the degree of danger to society presented by the prisoners and the possibility of reforming them is taken into consideration.

(*c*) In connection with this new approach to the problem of classifying prisoners, a tendency appears to abandon the differentiation of the prisoners from the standpoint solely of penal and administrative criteria, and to supplant this by a classification which takes into account the particular category of prisoners placed in a given penal establishment and the type of reformative action which the given establishment is to effect.

(*d*) The cellular system is being abandoned more and more as a means of carrying out the sanction of imprisonment and the cells are more and more used solely as quarters for the night, and during the hours free from collective work in the day.

(*e*) Undoubtedly, too, the attitude of the prison administration to the prisoners has become more humanitarian and imbued with a greater realization of the need for extending individual treatment to them.

(*f*) Some change has also taken place in views on prison discipline and on the role of disciplinary punishments. The concept of discipline has ceased to be solely an administrative formal one and disciplinary punishment solely a means of intimidation.

(*g*) Changes have also taken place in views on the rôle of work in prisons, which is becoming less and less a form of punishment and a hardship inflicted on prisoners and more and more a means of reformation, one which will, in addition, make it easier for the prisoner to find suitable employment after serving his term.

(*h*) In order to maintain contact with prisoners, as also to interest public opinion in the problems of penitentiary life, a special social service has been organised which remains in constant contact with such ex-prisoners and which, according to the statements of the prison administration itself, has become

a factor of prime importance in the task of reforming the prisoners.

(*i*) Great stress is laid on the training of the prison personnel and efforts are made to build up a fully qualified penitentiary staff.

(*j*) The Borstal system has been extended and greatly improved. The rôle of this system, in view of the category of offenders for whom it is destined, is a very important one; the introduction of the Borstal principles into other kinds of penal establishments is of no less a significance.

(*k*) The organisation of post-prison welfare work and supervision has been greatly extended and improved. In the Borstal field, this problem can be said to have been virtually solved whilst in that of convict and of local prisons steady progress is visible.

(1) Penal establishments which are particularly unsuitable for the application of reformative methods are being liquidated. At the same time, a prison building plan has been drawn up, the object of which is to construct a system of new establishments in which such action will be developed fully.

The English prison system not only yields nothing in comparison with the most modern systems in other countries, but even in many respects surpasses them. England's penal policy in the field of penitentiary practice has, particularly during the last few years, been a very bold, consistent and experimental one; it is being ever better understood in that country that the prison system is not only one of the divisions of the administration of the State but that it is also a kind of specific social service in combating criminality.

Yet, in spite of all that has been done, the work of prison reform in England can by no means be considered as finished. In spite of the transformations effected, there is still a very wide gap between the ultimate aims of the prison administration and the actual state of affairs in the prisons.

There can be no doubt that one of the best indications of the level of a given prison system is the type and scope of the classification of prisoners effected within that system. The more primitive the structure of the given prison system, the more simplified is the system of classification of prisoners which it applies.

The advances so far made in the classification of prisoners in the English penitentiary system can be characterised as follows—

(*a*) the system of classification now applied is not effected

from the administrative point of view but from that of the criminological one and primarily takes into consideration the danger to society presented by the given groups of prisoners and the possibility of their reform;

(*b*) in view of this approach to the problem of classifying prisoners, binding rules have not exhaustively regulated this matter, the prison administration being permitted to effect such further classification as it sees fit; whilst Rule 68 (1) of the Prison Rules of August 12, 1933, envisages a general scheme of general classification, Rule 68 (2) envisages the possibility of introducing new forms of classification ("The Commissioners may set up such other classes as may in their opinion be necessary for improving the methods of classification; and they may in their discretion authorise in particular cases or at particular prisons such departures . . ."); this passage is characteristic for the peculiarly empiric approach followed with regard to the problem of the classification of prisoners;

(*c*) the classification now being effected is more and more often effected without regard to the legal classification introduced by legislation; not so long ago, there were two separate services in the English penitentiary system: the penal servitude service and the imprisonment service; at present, in many cases, a prisoner sentenced to one of these forms of punishment is subjected to the other; this is characteristic of the existing tendency to differentiate punishment not according to the gravity of the offence committed but according to certain specific characteristics of the offenders;

(*d*) The classification now in course of realisation is introduced with due consideration of the whole prison population of the country; this embraces not only men and women, but also the aged and the young, first offenders and recidivists, prisoners already sentenced and prisoners remanded or pending trial; in this tendency of effecting a general and very detailed classification, the most characteristic is probably the difference made between prisoners on remand or pending trial: the prison administration has not contented itself with separating such prisoners from these already sentenced, but on the territory of the L.M.A. this group has been classified still further, i.e. Brixton prison, where they are concentrated, prisoners on remand or awaiting trial are divided, those who have never been sentenced before being placed in one wing and those who have been previously sentenced in another. This exceedingly

important differentiation has as its object to protect those prisoners who have never been convicted before against demoralisation.

(*e*) This classification is not only conducted from the negative standpoint (i.e.) to single out a certain group of prisoners in order to reduce or remove the danger of demoralisation) but also from the positive standpoint, i.e. with the idea of creating the most appropriate conditions for exerting some reformative influence; this is clearly stated in Rule 68 (1) of the Prison Rules mentioned above: "with a view to facilitating the training of convicted prisoners and to minimising the danger of contamination, the governor shall classify them . . ."; this positive function of classification has even been accepted as the chief and most essential one.

(*f*) The classification now effected primarily considers the age and status of the prisoner's criminality record. The intention of the English penitentiary policy is to apply reformative action primarily with regard to younger prisoners and to those whose criminal activity has not acquired a permanent and chronic character. It must be stated, however, that this group not only includes youthful offenders but also the rather older ones, the young adult offenders (even to the age of 35), as also to recidivist prisoners (in the last case, naturally, to those whose criminal record is still relatively short).

(*g*) The classification of prisoners is connected with an appropriate differentiation of penal establishments, which consists in the allocation of certain of these exclusively for certain singled-out categories of prisoners. Such differentiation of prisons has as its object the making it possible to subject the given group of prisoners to the most intensive reformative action. The classification of the prisoners leads to the specialisation of the penal establishments housing them. The establishments at Maidstone, Wakefield, Wakefield New Hall Camp, and Chelmsford are already really special institutions destined for strictly specialised groups of prisoners and prepared for certain specific modes of reformative action.

However, in spite of the fact that the above-mentioned acts are of great significance, the rational classification of prisoners in the English penitentiary system has not yet been carried out. It appears that in this connection, the following observations can be made—

(*a*) A general and exhaustive classification of the prisoners

has not yet been effected in the English system, and there are many prisoners who have not been classified at all, whilst other groups have been only partially classified.

Many of the offenders aged 17 to 23 are still being housed in prisons; very little has been done to single out these delinquents and to subject the young adults, first offenders and less serious recidivists to special reformative action.

(*b*) Experience indicates that in penal establishments not destined for certain defined categories of prisoners but for a number of various and diverse categories, the classification of prisoners does not yield satisfactory results. In such establishments the classification does not carry out its negative function with absolute precision (consisting in isolating the various groups from each other) and hence is all the further from carrying out its positive function (which consists in making it possible to effect suitable types of reformative action selected in view of the groups singled out). Everything points to the fact that several systems of reformative action cannot be conducted in one and the same establishment, without leading either to the supremacy of one or the incomplete application of all. There can be no doubt that the positive classification of prisoners requires specialisation of penal establishments, and there are only a few special establishments of this kind in England.

(*c*) The experience so far amassed also indicates that a general and exhaustive really modern system of classifying the prisoners connected with far reaching specialisation of penal establishments, demands the construction of a number of new prison buildings destined for a relatively small number of prisoners (350 inmates at the most). The complete realisation of the classification of prisoners is an extremely difficult task, and it is even quite impossible in buildings dating from another epoch, not only from another architectural epoch but also from another penitentiary one.

Apart from the general classification of prisoners, a classification according to mental conditions must also be effected in every rational prison system.

The necessity of taking the mental factor into account when examining the personality of prisoners with a view to establishing the action of penitentiary treatment upon them, has been fully accepted by modern criminological science. Undoubtedly, the results of research so far made into the genesis of psychical diseases, their classification and their rôle in the etiology of

criminality, no less than the methods of cure applied to date, are very often insufficient, fragmentary and lacking in the requisite precision. None the less, it is impossible to imagine a really modern penitentiary establishment in which the psychical factor with respect to the personality of the prisoners would not be taken into account, and in which the need for effecting a classification with due regard to psychical structure would not be recognised. There can be no doubt that the percentage of individuals more or less mentally defective must be very large amongst the inmates of prisons. Even if it is not always possible to accept this mental deficiency as the cause of the criminality, none the less, rational reformative action cannot shut its eyes to this factor. The conduct of a prisoner, his adaptation to prison conditions, his relations with the personnel, his participation in the reformative action of which he is the object, his susceptibility to reformative influences, the manner in which he conducts himself after serving his term, all these may in great measure depend on whether the delinquent is mentally deficient, psychically deranged or congenitally affected.

In connection with this problem, the rôle of the prison physician is changed fundamentally. Under the present-day conditions in prisons, the functions of the physician are not restricted to questions of the physical health of the prisoners and of the hygienic state of the establishment; he must also collaborate with the prison administration in elaborating and carrying out systems of classification of the prisoners, and in influencing the prisoners, primarily those who have been recognised as being psychically disordered. In this connection, it must be remarked that the concept of psychic disorder accepted by the binding English legislation is inadequate for application within the prisons.

Note must be made that: (*a*) in accordance with the regulations in force, the prison physician is expected to fulfil this new rôle in prison practice, and (*b*) the British penitentiary medical service understands the necessity for conducting a universal, psychiatrical classification of the prisoners.

Re (*a*): paras. 105, 106, 107, 108, and 109 of the binding Prison Rules (issued 12th August, 1933) refer to the medical officers; they determine and fix the scope of action of the prison physician as that of a factor bound to watch over the hygienic conditions of the establishment and over the health of the prisoners; paras. 61, 62, 63, and 107 (4) fix the functions of the medical officer in connection with the application and execution of disciplinary punishments, whilst para. 65 deals with the application of restraints. But on the other hand, paras. 110 (1), and 111 (1), (2)

allocate such functions to the prison medical officer and give him such rights that his activities are shifted from the domain of exclusively medical activities to that of the medical penitentiary field. These regulations undoubtedly give the medical officer in prisons some basis for closer collaboration with the prison administration with respect to the classification of prisoners and the treatment applied.

Re (*b*): another extremely important fact is, as already stated, that the English prison medical service has recognised the need for effecting very comprehensive and thorough psychiatrical classification of the prisoners. A most important document in this connection is the classification elaborated by Dr. W. Norwood East (Commissioner of the Prison Commission and director of the prison medical service). He inserted it in the *Report of the Commissioners and of the Directors of Convict Prisons for the Year* 1935 (published in 1937, see "Report of the Medical Commissioner," pp. 55, 56) and provided the following commentary: "A glance at the accompanying classification of the mental conditions of criminals as seen in English prisons should establish the complexity of the Medical Officer's task."

There is no lack of evidence indicating that under the present English prison system, efforts are being made to put the above postulates into effect.

(*a*) Prison medical officers conduct examinations of unconvicted prisoners (on remand or awaiting trial) upon instructions from the courts.

(*b*) Examinations are effected as to the personality of all the offenders aged 17 to 23 and sentenced to Borstal sanction: in these examinations, the factors of psychical health, congenital disorders, etc., are investigated.

(*c*) A special psychiatrist has been appointed to Wormwood Scrubs in order to examine and cure certain cases.

(*d*) Many prison medical officers make studies of various problems interesting them, and publish their findings at annual conferences of prison physicians.

(*e*) Prisoners are being constantly transferred from prisons to lunatic asylums or to institutions for mental defectives in accordance with the stipulations of the respective laws, which foresee the possibility of mental disorders developing in prisoners during their term of sentence and permit the prison administration to transfer them in this case to appropriate institutions.

(*f*) Such cases as do not fall within the relatively narrow

limits of the law respecting mental defectives (so called "non-certifiable cases") are directed to special divisions of certain penal establishments.

In spite of the fact that the above changes are most important and yield valuable results, it cannot be stated that psychiatrical classification has been fully developed in the English prison system. Dr. East rightly warns us against an over simplified approach to the subject, and reminds us of the errors made in the era of phrenological and of anthropological criminal examinations. None the less, the findings of Continental and American science indicate that much may already be done in the field of the psychiatrical classification of prisoners in spite of the essential caution which has still to be exercised.

The carrying out of such a reform is contingent on the satisfaction of the following conditions: (*a*) There must be engaged a medical personnel which is sufficiently large and has adequate criminological-psychiatrical training and knowledge and it must devote itself solely to work in penitentiaries; (*b*) special bio-criminal laboratories should be established in the prisons to serve as centres for this work; (*c*) exhaustive examinations of the personality of prisoners should be conducted in the prisons and should then form the basis for a proper classification (Goring's work, which constitutes an item of lasting worth in criminological literature, chiefly had as its object the examination of the query whether there is a separate anthropological type of the criminal, and to-day fails to answer a number of questions advanced by modern criminal biology); (*d*) the percentage of prisoners who are not fully sane and in possession of all their mental faculties should be determined exactly; prisoners who have been eliminated under present conditions, constitute only an insignificant part of this category; (*e*) a certain category of mental defectives should be housed in penal establishments specially set up for this purpose and designed to exert a curative and reformative influence; obviously not all the prisoners recognised as psychically deranged need necessarily be eliminated from normal prisons but there can be no doubt that some of them require a separate system; (*f*) in cases of mental defectives discharged from prison closer collaboration should be introduced between the after care organization and the different institutions which (practically or theoretically) occupy themselves with mental defectives.

It would appear that the solution of the problem of mentally defective prisoners depends primarily on the solution of the above-mentioned questions.

This divergence between the purpose aimed at and the results

so far achieved still undoubtedly exists in a great measure in both the general and psychiatrical classification of prisoners; it can be noted also in a number of other divisions in the modern English penitentiary system.

It can be stated that the Borstal system has really and actually been reformed; it is now an organically conceived system for the reformation of prisoners. Within the limits of that system, methodical examinations of the personality of prisoners have been organised, and a precise classification has been drawn up; in addition, a network of establishments appropriate to this classification has been built up, extra-mural supervision has been organised in close connection and contact with the reformative technique in use within the Borstal institutions. Undoubtedly some further improvements in the system obviously suggest themselves. It would, for instance, be advisable to construct more modern buildings, to modernise the system of work, to break with the old type of Borstal institution in a more decisive way, and to adopt more widely such a type of establishment as that at Lowdham Grange or the North Sea Camp; it would likewise be advisable to organise an institution which would make a more thoroughgoing investigation of cases of offences committed by former Borstal inmates, and so on. Undoubtedly, too, quite a number of improvements and innovations could be introduced into the Borstal system, but the possibility and even the necessity for such changes in no way affects the fact that in this field of British penitentiary policy a reform has been realised in the fullest sense of the term. Naturally the scope of the reform is restricted in so far as the Borstal system does not apply to all offenders aged 17 to 23 who should be subjected to its reformative action but only to a relatively small part of this element, in accordance with the binding legislation.

"Penitentiary reform" implies, after all, not an aggregate of certain individual innovations, however significant and vital, effected in the domain of the prison system, but rather the basic and radical reconstruction of that system. A reform, conceived along these lines, has not yet been carried out with regard to the adult prisoners, although, as already stated, quite a number of extremely important innovations have been introduced, many interesting experiments made, and the track blazed for the future progress which is to be made in this direction. The conducting of reforms in the prison system for adults really means the introduction of Borstal principles into the system: examinations of the personality of the prisoners, an appropriate classification and segregation in suitable establishments on the basis of such

classification, subjecting the prisoners to the intensive action of a specialised personnel, and proper supervision over them by a special organisation when they leave the prison walls.

Undoubtedly, between such a prison system for adults and the Borstal system there must be differences, which will primarily consist in the selection of modes of acting on the inmates with a due regard to their susceptibility to reformative action. But these differences need not possess fundamental significance, and such selection exists in some measure within the Borstal system itself.

There are elements in the Borstal system which must constitute the basic ideas of every type of penitentiary reform. If the reforms now being introduced in England with respect to the prison system for adults attain full realisation, this will be tantamount in practice to the application of the basic Borstal elements and principles to this category of prisoners.

Leon Radzinowicz.

THE REPORT OF THE TRANSPORT ADVISORY COUNCIL ON THE SQUARE DEAL DISPUTE

The law governing railway rates has been much in the public eye of late. The economic and social significance of this branch of the law need hardly be emphasised. The railway companies desire to obtain a larger measure of freedom of contract with regard to the amount of their rates, and the bulk of the existing statutory provisions is to be repealed. This contemplated revolutionary change in the English law of inland transport raises the general issue of the law's attitude towards competition and monopoly. The way in which a solution of the problem is now attempted confronts the lawyer with new aspects of the method of legislation. The recent Report of the Transport Advisory Council (T.A.C.) therefore deserves the closest attention of those who are interested in the general trend of the process of legislation.[1]

I

It is necessary to say something about the existing law in order to be able to deal with the changes proposed by the Report. The existence of railways confronted the legislator with a threefold task: The protection of the public against possible encroachments on the part of a monopolist, the protection of the railways themselves as institutions of public importance, and, finally, the protection of those rival transport undertakings which had been able to survive the advent of the railways in the modern industrial community.

Most of the statute law referring to railways which has been enacted since the 'forties and 'fifties of the last century can be understood as an attempt to protect the trading community from harm which might be done by a monopolist. In the early days[2] the private Acts by which railway companies were created and endowed with compulsory powers imposed upon the railway companies statutory maxima of rates in order to prevent them from exploiting consignors and consignees at their pleasure. Within those maxima the railway companies were free to demand whatever charges they liked, provided they did not infringe the rules against inequality of charges and undue preference about which something will have to be said below. This system of statutory maxima remained in force until the outbreak of the Great War, although in practice legislation passed in the early 'nineties made it wellnigh impossible for the railway companies

[1] Transport Advisory Council. *Report on the Proposals of the Main Line Railway Companies as to the Conveyance of Merchandise by Rail.* London, H.M. Stationery Office, 1939. 1s. 6d. 95 pp.

The T.A.C. was created by s. 46 of the Road and Rail Traffic Act, 1933, "for the purpose of giving advice and assistance to the Minister of Transport in connexion with the discharge by him of his functions in relation to means of, and facilities for, transport, and their co-ordination, improvement, and development." The members are appointed by the Minister of Transport and include representatives of local authorities in England, Wales, and Scotland, of users of mechanically propelled vehicles and horses and horse-drawn vehicles, of pedestrians and pedal cyclists, of railways, canals, coastwise shipping, harbours and docks, of labour, and of trading interests including agriculture. The T.A.C. is thus, in effect, a kind of Transport Parliament.

[2] See Leslie, *The Law of Transport by Railway*, Second Edition, p. 315.

to make full use of the power to raise their charges *ad libitum*.[3] The system of maximum charges was, however, abandoned when an entirely new system of railway law came into force with the Railways Act, 1921. The maxima were replaced by so-called standard charges, i.e. rates fixed by a judicial body, the Railway Rates Tribunal, which were subject to annual revision, and were to be regarded as fixed charges which could in no case be raised by the railway companies themselves and which could be reduced only in a way prescribed by statute.[3a] The Railways Act, 1921, can only be understood, if it is realized that the legislator regarded the railways still as monopolists. The theory that the price for the services performed by the railways could be fixed beforehand and was to be unalterable, at least in principle, arose from the conception that the question of supply and demand and the necessity to meet competition would not, as a rule, enter into the matter. The technical and commercial development of the post-War years belied this forecast, with the result that for most of the traffic the standard rates operated in fact as maxima within which the companies made use of their statutory right to grant "exceptional" rates to traders.[4] It may thus be said that the attempt to convert the pre-War system of statutory maxima into a post-War system of statutory fixed rates has failed, at least to a very large extent, and that in fact, though not in law, the legal system of railway charges now in force has much more in common with the system of the Railway and Canal Traffic Act, 1888, than may appear at first sight.

There is, however, in law and in fact, one very important difference between the pre-War system of maxima and the present one. In the nineteenth century, at least until the restrictive legislation of the early 'nineties came into force, the railways were free to move within their maxima upwards and downwards as they pleased. This is not so under the Railways Act, 1921, and it is here that we meet with one of the big grievances to which the square deal agitation gives expression. In order to charge for carriage of goods less than the standard rate, the railway companies have to grant what is known as an exceptional rate. This is not a rate based on a contract between a given railway company and a given trader for a given consignment or group of consignments, but a "miniature standard rate,"[4a] i.e. a rate lower than the standard

[3] The system of maximum rates was modernised and simplified by the Railway and Canal Traffic Act, 1888, s. 24, and the various Rates and Charges Order Confirmation Acts, 1891 and 1892. But it was intended to remain a system of *maximum* rates. However, on the 1st of January, 1893, most rates were raised by the companies to the maximum. In order to check this action on the part of the companies, Parliament passed the Railway and Canal Traffic Act, 1894, which provided that an increase of rates even *within the maximum* was to be valid only if the Company could prove that the increase was reasonable. This enactment was retrospective and took effect as from the end of the year 1892. It operated so as to convert all existing rates into what were in fact fixed rates and to make the maxima meaningless.

[3a] Railways Act, 1921, s. 32. [4] Railways Act, 1921, s. 37.

[4a] A standard station to station rate consists of three parts: the rate for conveyance, the station terminal (being the remuneration for the use of stations and for clerical work, etc.), and the service terminals, being the remuneration for services like loading, covering, etc. See s. 30 and Schedules IV and V. An exceptional rate, being a "standard rate *en miniature*" is capable of being "disintegrated," i.e. it is deemed to be "built up" of constituent parts proportionate to those of the standard charge out of which it is "carved." The railway company must show, on request, which part of the exceptional rate represents the consideration for the conveyance itself, which is the equivalent of services at the stations, etc. S. 40.

applicable to a class of goods travelling over a defined route. It is, therefore, available to every trader who sends these goods over this particular route. The power to grant exceptional rates does not mean that the railways enjoy freedom of contract within the standard. It only means that, if they follow the procedure prescribed by law,[5] they may replace the prescribed standard charge by a lower, but equally statutory charge. When granting an exceptional rate, the company does not act as a contracting party, but as an organ within the legislative process. Every granted exceptional rate has to be reported to the Minister of Transport[6] who may refer it to the R.R.T. for revision, cancellation or modification.[6a] The railway companies are not at liberty to grant exceptional rates lower than forty per cent below standard without obtaining the consent of the R.R.T.[6b] The R.R.T. may also fix exceptional rates upon application by a trader or association of traders.[6c] Finally, the cancellation, increase and reduction of exceptional rates are subject to certain statutory restrictions.[7]

The rigidity of these rules was somewhat mitigated by the Road and Rail Traffic Act, 1933.[8] By that time it had become obvious that a more effective way of coping with road competition would have to be opened to the railway companies, and the Salter Report[9] was made with this object in view. The law of 1933 introduced a third type of charge, the agreed charge, which, in contradistinction to the exceptional rate is of a contractual character. An agreed charge is a rate made by contract between a railway company and a trader. It need not, and does not as a rule, bear any relation to the system of standard charges contained in the Railways Act. It is not necessarily connected with the ton-mile calculation which underlies every standard and every exceptional rate, and it is only available to the individual trader who has made the contract with the railway company. Thus, the Act of 1933 made a first step towards adapting the railway companies' legal position to their new situation as competitors with carriers by road, but it failed to satisfy the desires of the railway companies. The agreement is subject to the approval of the R.R.T., and the consent of the R.R.T. is only given after a public hearing at which rival traders may raise objections. Moreover, a rival trader who feels aggrieved by the agreed charge granted to his competitor may obtain an "imposed agreed" charge from the R.R.T., even though the railway company over the system of which he consigns his goods, is not the one which granted the agreed charge. Evidently, though dealing with the railway companies as suppliers of services in a competitive market, the Act makes every possible effort to prevent the railway companies from abusing their new privileges where they still happen to be monopolists. The railway companies object to the necessity of obtaining the R.R.T.'s approval for every agreed charge, and they resent the publicity which is thus forced upon them in connection with these contracts.

There is always a danger lest a monopolist should arbitrarily interfere with the conditions under which his own customers compete. From the

[5] S. 37.
[6] S. 37 (1).
[6a] S. 37 (2).
[6b] S. 37 (1), as amended by s. 40 of the Road and Rail Traffic Act, 1933.
[6c] S. 37 (3).
[7] S. 38.
[8] S. 37.
[9] *Report of the Conference on Rail and Road Transport*, 1932.

earliest days of railways the legislature has regarded it as its task to protect the trading community from inequality of railway charges and from undue preference by the company of one trader in comparison with another.[10] The provisions prohibiting inequality and undue preference have given rise to a formidable body of case law, but, since the 1921 Act came into force, those cases have been few and far between. It seems that the real importance of the provisions against undue preference had spent itself with the coming into force of the new system of exceptional rates briefly described above, for there was little opportunity for preference now that an exceptional rate could no longer be granted to an individual trader and that producers of, or traders in, a class of goods competing with a class favoured by an exceptional rate were in a position to ask the R.R.T. to fix a similar exceptional rate for their own benefit.[11] The system of agreed charges under the 1933 Act might have revived the law of undue preference, had it not been for the clause in the Act which made it impossible to complain of an approved agreed charge as an inequality or undue preference.[11a] It will thus be readily seen, that from the point of view of the existing law there would not seem to be much substance in the railway companies' complaint that they are hampered by provisions enacted almost a century ago. Moreover, if one looks at the case law developed under the clauses of the Acts of 1845, 1854, and 1888, one cannot fail to perceive that the Courts have been willing to lend an ear to the railway companies whenever there was any justification for a discrimination of one trader or group of traders in comparison with another. Not only higher costs of the service performed,[11b] compensating advantages given to the company by a preferred trader, and the like, but even the fact that it was necessary to ward off existing competition on one line, but not on another, have been held to be justifications for a preference.[12] Yet, it is not difficult to understand why the companies attach so much importance to the repeal of the law of undue preference. Though of perhaps comparatively little practical importance now, this part of railway law would at once regain all its former significance if the railway companies' other demands, particularly those for the repeal of the system of standard, exceptional and agreed charges were granted. The outcry against the law of undue preference is directed not so much against what this part of the law does now, but against what it would do, if the "square deal" campaign succeeded in other respects. For this reason the repeal of the relevant provisions of the Acts of 1845, 1854, and 1888 is the necessary corollary to the reform of the general charging system.

There is no need for the law to force a competitor in a market to give any publicity to the prices which he means to demand for his goods or services. It will be his own interest to make them known to the community as a whole. In the case of a monopolist, however, the law must ensure that

[10] Railways Clauses Consolidation Act, 1845, s. 90. Railway and Canal Traffic Act, 1854, s. 20. Railway and Canal Traffic Act, 1888, s. 27.

[11] *James Dole and Co.* v. *The Four Amalgamated Railway Cos. and the L.P.T.B.* (1937), 25 Traffic Cases 87.

[11a] Sect. 37 (9). About the eclipse of the law of undue preference see Kahn-Freund, *Law of Carriage by Inland Transport*, p. 404.

[11b] *Town Commissioners of Newry* v. *G.N.Ry.Co. of Ireland* (1891), 7 R. and C.T.C. 184.

[12] See the cases summarised in Kahn-Freund, *loc. cit.*, at p. 400. See in particular the dictum of Scrutton, L.J., in *Association of Master Lightermen and Barge Owners* v. *S.Ry. Co.* (1933), 21 R. and C.T.C. 126, at pp. 151–152, and that of MacKinnon, J., at p. 138.

prospective customers have ample opportunity of finding out beforehand the prices which they are expected to pay. Moreover, publicity of charges is, in the case of railway companies, one of the means of enforcing obedience to the legislation with regard to statutory rates and undue preference. Ever since 1873[13] the railway companies have been subject to the utmost publicity of all their rates. They have to keep a rate book open for inspection by the public at every station. This rate book shows all the standard and exceptional rates in force from that station, and also enables a trader to see how the rate can be disintegrated into its constituent parts, so as to make it possible for him to claim the proper rebate, if he does not wish to make use of all the services which are covered by the rate. Agreed charges under the 1933 Act, though not included in the rate book, are given publicity by the R.R.T., as mentioned above. This is one of the main complaints of the railway companies. They maintain that "undercutting" by road carriers is almost invited by this publicity and they say, rightly or wrongly, that in some cases at least the basis of the road carriers' calculation is neither the cost of his services, nor "what his traffic will bear," but the railway rate which he ascertains before quoting his own rates. With regard to this vital point, the question of publicity, the T.A.C. have unfortunately been unable to arrive at a definite recommendation, in view of the formidable dispute between the companies and the trading interests in this matter. It will no doubt be felt that this is a serious gap in the system of innovations inaugurated by the Report (s. 33*c*).

Other aspects of Parliament's endeavour to curb the railways in their capacity as monopolists are the provisions which force them to grant reasonable facilities to the public[14], those imposing upon the companies a system of through rates[15], and those dealing with the statutory conditions as to the liability for the safety of goods, etc., under which they carry.[16] The railway companies have given up their demand for a repeal of those provisions, and the T.A.C. accordingly does not recommend any alteration in this respect. They can, therefore, be left out of account for our present purposes.

The gist of the Report, as far as railway rates are concerned, is the proposal to repeal the whole body of statute law providing for classification of goods, standard, exceptional and agreed charges, as well as the provisions prohibiting inequality and undue preference, and to restore the companies' freedom of contract in these matters.

II

One of the features which distinguish the system of the Railways Act, 1921, from pre-War legislation is, that railway law has become a means of protecting the railway companies themselves. This was at least the intention of the legislature, though it is common ground that in this respect more, perhaps, than in others the Railways Act, 1921, has proved to be a complete failure. The standard charges were fixed in such a way as to

[13] Regulation of Railways Act, 1873, s. 14.
[14] Railway and Canal Traffic Act, 1854, s. 2. Railways Act, 1921, s. 18.
[15] Railways Act, 1921, s. 47.
[16] Railways Act, 1921, ss. 42 to 45, and Standard Terms and Conditions for Carriage. The proposals contained in the T.A.C.'s Report will necessitate a revision of the existing system of Company's Risk and Owner's Risk Conditions which is based on the difference between Standard and Exceptional Charges at Company's and at Owner's Risk. See s. 46.

yield with economic and efficient management the "standard revenue," i.e. the revenue attained by the companies in the standard year 1913 in addition to a return for certain capital investments not then in existence. The powers granted by the Act to the R.R.T. of reviewing standard as well as exceptional charges were to be exercised with a view to preventing a falling off of the company's income from the level of the standard revenue (and, incidentally, also in order to prevent them from earning more than twenty per cent above the standard revenue).[16a] So much was the legislature of 1921 imbued with the idea of the monopolist character of the railways that a falling off of income was thought to be capable of being remedied by a raising rather than a lowering of their charges. It is common knowledge that the railways have never succeeded in earning the standard revenue, and only once, in 1937, did the R.R.T. exercise its power of raising the standard rates.[17] It was clear that it would have been utterly futile to try to use the machinery of the 1921 Act in order to assist the railway companies in their struggle against their competitors on the road. In the Report of the T.A.C. (s. 23) the abandonment of the standard revenue protection figures as a concession made by the railway companies, but the surrender of the standard revenue by the companies can hardly be regarded as a major contribution to the compromise visualised by the T.A.C. It is, however, an integral and necessary part of the reform now contemplated, and the disappearance of this "protection" is not likely to create any opposition from any quarters.

The limitation of the railway companies' power to grant exceptional rates and the necessity for obtaining the R.R.T.'s approval to every agreed charge must also be regarded as part of the protection given to the railway companies themselves. These provisions, however, have proved to be more of a burden to the railway companies than of a benefit, and their repeal is now demanded by the companies themselves.

It may be noted that under the Local Government Act, 1929, as amended by the Railway Freight Rebates Act, 1936, the railway companies were put in a position to compete more effectively with their rivals in relation to the carriage of certain goods. This was done by the creation of the Railway Freight Rebate Scheme under which local rates hitherto paid by the companies to local authorities were now paid into a fund out of which rebates granted to traders by the companies were financed. This part of the protection of the railway companies will be maintained, if the proposals of the T.A.C. become law, but it will be adapted to the new law by way of consequential amendment (s. 33, j. III).

By special Acts passed in 1928 the companies were granted powers to act as road carriers and thus to enter into competition with their rivals in their own field.[18] No change is contemplated by the T.A.C. in this respect (s. 33, j. IX).

It is impossible to understand the present position without realising that the most effective protection hitherto afforded by the law to the railway companies is to be found outside railway law proper. The Road and Rail Traffic Act, 1933,[19] which, following the Salter Report, for the first time introduced a licensing system for goods vehicles on the road, enjoined

[16a] Ss. 58, 59.

[17] *Standard Charges—Ninth Annual Review* (1937), 26 T.C.I.

[18] Southern Railway (Road Transport) Act, 1928 (and corresponding Acts for the other companies), as amended by Road and Rail Traffic Act, 1933, s. 44.

[19] For a discussion of the Act, see Maxwell, *The Law of Carriers' Licences.*

the licensing authorities to "take into consideration any objections to the application which may be made by persons who are already providing facilities, whether by means of road transport or any other kind of transport, for the carriage of goods" in the area in which the prospective licence holder intended to operate. It is true that this provision has no application to the so-called C Licence which has to be obtained by an "ancillary user" and which is granted as of right. But it applies to A and B Licences, i.e. to the licences to be taken out by those who intend to act as carriers for hire or reward either exclusively or partly. It is applicable not only to the granting of new but also to the renewal of existing licences and to every extension of his fleet of vehicles by a road haulier. Thus it proved to be a most effective weapon in the hands of the railway companies for the purpose of restricting the scope of activities of road carriers. The case law[20] developed under the Act emphasised the necessity of proving that there was a demand for additional carriage facilities, and it is in each case for the applicant to show that existing requirements cannot be covered by existing facilities and railway facilities in particular. If the Road versus Rail War is to come to an end, these provisions cannot be left out of account, but it would be wrong to assume that, from the point of view of the question of competition and monopoly, their importance exhausts itself in the protection of the railway companies. By making it difficult, if not impossible, for a new entrant to obtain an A or B Licence the law did not only safeguard the railway companies, but also existing road transport undertakings from additional competition. This vital point must not be overlooked. The Railway Companies, in resisting applications for licences made by new entrants served not only their own interests but also those of the existing road carriers. What they resented was the opposition of the Railway Companies against the renewal of existing licences and the extension of the business of their holders. It is not as if all road hauliers were necessarily and in every respect opposed to the Railway Companies.

No change in the provisions of the Road and Rail Traffic Act is proposed by the T.A.C., but their recommendations for the repeal of the present statutory regulation of railway charges are based on an agreement made between the Railway Companies and the "Liaison Committee on Road Transport Rates." Under this agreement the Railway Companies have undertaken "not to raise objections during the ensuing two years after they have been given their freedom" either to the renewal without any alteration of existing A or B Licences or to the granting to existing hauliers of A licences for additional vehicles, or to the granting to existing hauliers of additional B Licences for vehicles whose operations are limited to a radius not exceeding 25 miles (Appendix VI, s. 11). The Liaison Committee, on the other hand, "raises no objection to the proposals of the railways for the removal of statutory control of their merchandise charges" (ib. s. 7). This agreement is the basis of the proposals made by the T.A.C. It is expressly mentioned in the T.A.C.'s Report that the above-mentioned undertaking given by the Railway Companies is an integral part of the agreement.

[20] The leading cases are *Ridgewell and Co.* v. *Southern Railway* (1934), 22 T.C. 6, and *Enston and Co.* v. *L.M.S. Ry. Co.* (1934), *ibid.* 3. For an analysis of the case law see Ponsonby: *The New Conditions of Entry into the Road Haulage Business*, and *Economics*, 184 (May, 1937), and Walker: *Road Transport Economics and the Law*, 3 *M.L.R.* 21.

The Railway Companies have not undertaken to refrain from opposing applications made by new applicants. The peace settlement inaugurated by the Report does not include rail and road interests as a whole. It constitutes a compromise between the railways and existing road interests at the expense of those who wish to enter the business. The relief of the Railway Companies from antiquated monopolistic restrictions is not going to be opposed by the road undertakings. By way of return they are given freedom of expansion and security of tenure, but they are not to be deprived of the railways' assistance in warding off prospective competitors. There are some who think that the "Square Deal" does not mean the substitution of free competition for anti-monopolistic hindrances, but a rail-cum-road monopoly, not sufficiently curbed by legislative safeguards in favour of other carriers and the trading community.[21]

A remarkable objection is raised by the road interests against the new dispensation. The road carriers express their fear "that the case law established up to the present by the objections of the railways in the past would have the effect of visibly diminishing the value of the proposal" not to oppose certain applications for licences in future (Appendix VI, s. 12), and the T.A.C. itself regard this objection as sufficiently necessary to mention it in the body of the Report (s. 44). Jurists will observe the importance of this point for the principle of precedent in its application to decisions of administrative tribunals. Where a Court has the function of settling disputes which are the outcome of collective conflicts, a re-adjustment of the conflicting interests may be hampered by the binding effect of previous decisions rendered by the Court. The interpretation given to the Road and Rail Traffic Act by the Appeal Tribunal was the result of a conflict of interests between rail and road. It was, in fact, the making of new law, and the settlement of a social dispute of the first magnitude. The principle of *stare decisis* has a tendency of perpetuating the outcome of a given social situation beyond the point where that situation itself has changed, and of preventing the parties to the collective dispute from revising their settlement.

Even at the height of the railway monopoly there were in existence certain competing forms of transport, chiefly by water, though their activities were limited to certain types of traffic. Canal traffic and coastwise shipping have always been of importance in this country, in particular for bulky and heavy goods. Since the railways were in a better position to endure a loss on these traffics than either canal carriers or coastwise liner companies, or coastwise tramp shipping, these latter interests stood in need of protection against undercutting by the railways themselves. A number of provisions have been enacted in the past with a view to safeguarding the independent existence of canal companies and coastwise carriers.[22] The Report of the T.A.C. proposes to maintain these provisions and to adapt them to the new railway legislation and also to ease the position of those few canal owners who still act themselves as carriers. Hitherto they were still governed by a modified system of maximum rates which will disappear, if Parliament adopts the Report of the T.A.C. (s. 59).

[21] This fear is expressed by the Traders' Co-ordinating Committee on Transport supported by the Federation of British Industries and the Mansion House Association on Transport in their Memorandum printed in Appendix XX.

[22] See, for example, Railways Act, 1921, s. 39, and Road and Rail Traffic Act, 1933, s. 39.

III

If the proposals of the T.A.C. become law, the substantive law of railway rates will return to the point from which it started one hundred years ago. The common carrier at common law was under a duty not to pick and choose between his prospective customers and not to refuse a consignment offered to him for carriage, provided the goods were of the type which he professed to carry and the place of destination was within the area which he professed to serve. To demand unreasonable rates was equivalent to a refusal to carry. Thus the common law contained the germ of a control of railway rates. All the statute law governing rate making will be repealed, if Parliament gives effect to the proposals made by the T.A.C. There will be neither standard rates, nor exceptional rates, nor agreed charges, there will be no statutory classification of goods, nor will there be a statutory disintegration of rates. The railway company's remuneration for its services will be a matter of agreement with the consignor or consignee, just as road rates are at the present moment, and as all carriage rates were before railways came into being. There is only one restriction to this: The rate must be reasonable (ss. 33*a*, *b*, *f*, 37 I, III, V, VI, and 48). If the rate fixed by agreement is not reasonable, the R.R.T. can replace it by a reasonable rate. The proposals contain an enumeration of those points which the R.R.T. is to take into account when considering the reasonableness of a railway rate. They are—

(*a*) Whether or not the charge is detrimental to the public interest;

(*b*) variations in the value of currency;

(*c*) the cost of affording the service or services in respect of which the charge is made;

(*d*) the existence of any alternative or competitive transport facilities for the conveyance of the merchandise in respect of which the charge is made and the charges made for the carriage of like merchandise by such alternative means of transport;

(*e*) the effect of the charge on the financial position of the parties concerned either generally or individually;

(*f*) the charges made to other traders for the carriage of like merchandise, if it affects the trader concerned, and (see s. 48) "any charges agreed with other forms of transport (including those approved by the proposed Road and Railway Rates Tribunal) with a view to avoiding uneconomic transport charges."

Any lawyer who is familiar with the attitude of the Courts towards the conception of public interest cannot fail to be somewhat apprehensive at these proposals. Is it likely that the R.R.T. will be prepared and able to take into consideration any public interest which does not happen to be represented by counsel? Is it out of place to remember in this connexion the fate which the conception of "public interest" suffered at the hand of the Courts in connexion with restraint of trade? Will there not be a presumption that what is reasonable between the parties is also reasonable from the point of view of the public?

It is one of the T.A.C.'s recommendations that the whole existing body of law with regard to undue preference and equality of charge should be repealed (s. 33*a*). Its place is to be taken by the provisions mentioned above. The Railway and Canal Commission, therefore, will no longer be concerned with claims arising from undue preference, but it will be for the R.R.T. to take into account charges made to rival traders when

considering the reasonableness of a proposal. In this respect the law as visualised by the Report continues the development entailed in the decision in *Dole's Case* in which the R.R.T. decided that the prevention of undue discrimination was one of the matters to be taken into account by the Tribunal in connexion with an application for the fixing of an exceptional rate.[23]

The Railway Companies have arrived at a number of agreements with various trading interests, represented by the Traders' Co-ordinating Committee on Transport (supported by the Federation of British Industries), the Mansion House Association on Transport, the British Iron and Steel Federation and Agricultural Representatives, but they failed to come to terms with the Mining Association of Great Britain. The various agreements provide (see Appendices XI, XII, and XIII) for the setting up of conferences of railway and trading representatives. The T.A.C. approve of these agreements (s. 29) and make them part of their proposal for the new machinery of rate making. Before the R.R.T. can be approached in order to obtain a decision as to the reasonableness of a rate the matter must go before one of these regular periodical meetings which, however, are not to be given a statutory character (ss. 34, 35). If agreement is reached at this conference with regard to a general increase of rates, that is the end of the matter, and it is notable that no appeal to the Tribunal is provided in this case. It is considered that conformity of opinion of the Railway Companies and the trading representatives is a sufficient safeguard obviating an interference by a public authority, and a rate so fixed is obviously deemed to be "reasonable" (s. 37 I). It is only when the railways fail to reach agreement with the trading representatives as to a general increase that the necessity for a more formal proceeding arises. The companies must then give formal notice of their proposal to increase the rates, the case is brought before the R.R.T. who give a public hearing to the matter and decide whether the contemplated increase is reasonable. The companies are, however, given the privilege that they may fix an appointed day from which the increase is to take effect and the increase comes into force whether or not the R.R.T. has rendered its decision in the meantime. If the Tribunal comes to a decision unfavourable to the companies they must repay rates levied in excess of what the Tribunal deems reasonable, a statutory debt for money had and received. It might be argued that the institution of the appointed day goes a long way to giving the companies an upper hand in cases of this kind.

The procedure is somewhat different in cases in which the railway companies propose an increase in individual charges only. It is not compulsory to bring the matter before the conference in a case of this kind. All the company has to do is to give one month's notice to the traders concerned and it is then for the traders, if they cannot come to an agreement with the company, to refer the matter either to the appropriate conference and afterwards to the Tribunal or to the Tribunal directly. Again it seems that the increase takes effect as from the date fixed by the company and that the overcharge can be re-claimed if the ultimate decision is against the company (s. 37, III, IV).

Machinery is also provided for the reduction of charges. Traders or bodies of traders may approach the Tribunal with a view to obtaining a reduction of charges either on the ground that they are too high, or because

[23] Above note 11.

charges made to rival traders are lower than the charges complained of. This power given to the trading community of having existing charges revised at any time by the Tribunal is probably the most significant safeguard by which the T.A.C. try to counterbalance the great freedom of action conferred by their recommendations on the railway companies. This recommendation, however, should be read in the light of what will have to be said below about the effect of agreements between the railway companies and other carriers.

IV

When considering the Railway Companies' demands for a repeal of their existing statutory restrictions, the T.A.C. was faced with a twofold task. It had to adjust the Railway Companies' interests and those of the traders, and an attempt has been made above to show in outline how this was done. But at the same time the T.A.C.'s Report was meant to constitute the peace treaty between the railway companies and their rivals chiefly on the road. Perhaps it would be more appropriate to call it an armistice, since it is of the essence of the recommendations that they are to be of a temporary character only and to be in force for no more than five years (s. 16). The ultimate objective of the T.A.C. is the co-ordination of the systems of rail and road charges. The railway companies had originally urged the extension of their statutory restrictions to transport by road. A previous Report on Service and Rates made in 1937 by the T.A.C. had proposed to create rate structures for road hauliers and canals (see s. 7 of the present Report). In the meantime, however, the Railway Companies changed their attitude. Since it appeared that it would take a considerable time before the creation of a system of statutory charges for road transport could be thought of, they claimed that as a preliminary step their own restrictions should be removed. The British Road Federation (Appendix XVI, s. 6) and the Scottish Commercial Motor Users' Association (Appendix XVIII, s. 8) call this a "*volte-face* of the railway companies." Be that as it may, the Railway Companies have asked for the repeal of their own restrictions and succeeded at least before the T.A.C.

To these proposals they obtained the consent of all the trading interests with the exception of the Mining Association of Great Britain, since in relation to coal the railway companies are still very largely in the position of monopolists (see Appendix XIV and XV). They also obtained the consent of the representatives of their own competitors, but, as pointed out above, at the price of not opposing certain kinds of applications for A and B Licences for two years.

The basis of the T.A.C.'s recommendations providing for the protection of other forms of transport against encroachments by the now unfettered railway companies is the agreement between the Railway Companies and the Liaison Committee on Road Transport Rates (Appendix VI). This agreement has found the approval of the T.A.C. (s. 41). It provides—and so does the Report (s. 45)—for the setting up of a Central Consultative Committee representing the railway companies as well as the road haulage interests. This Central Consultative Committee which has power to appoint Regional Committees will formulate "the principles on which voluntary agreements can be entered into with regard to the charges to be made for the carriage of merchandise traffic by road and rail either generally

or in respect of particular commodities or particular routes or areas." These agreements are to provide for the conditions of carriage, for rates and charges and for the places between which these rates and conditions are to apply. They are in the nature of price fixing or trade protection agreements and are an attempt at overcoming whatever there may be of competition in the business of carriage by joining up the interests of the organised road hauliers with those of the railways and by preventing competition between the two forms of transports from having any appreciable influence on the level of the rates.

Such, however, is the structure of the road transport industry that agreements of this kind would be ineffective, unless legal machinery was provided in order to bind outsiders. We are here approaching what, from the legal point of view, is undoubtedly the most remarkable innovation contemplated by the Report. Following with some important modifications the suggestions made by the Railway Companies and the Liaison Committee (Report s. 47 and Appendix to Appendix VI) the T.A.C. recommends that observance of these agreements by outsiders as well as by those taking part in the agreement should be legally enforceable. The draft clauses contained in the agreement between rail and road interests visualise the creation of a Road and Railway Rates Tribunal charged with the duty of scrutinising such agreements and, if they think fit, extending them to outside interests. As modified by the T.A.C. the new scheme is as follows:

Agreements made between one or more railway companies and an association or associations adequately representing road carriers are first to be referred to the Minister of Transport who gives a preliminary certificate that the agreement has been so made. The view expressed by the agricultural interests that no such certificate should be given, unless the body or bodies of road carriers which have made the agreement have received a mandate expressed by a poll of the A and B Licence holders affected, is recorded by the T.A.C. but not embodied in its proposals. An agreement so made is then to be referred by the Minister to a Road and Railway Rates Tribunal. This body will be composed of an independent chairman, a railway representative, a representative of the A Licence holders, and two representatives of the traders. It will publish the application and hear objections to its approval made either on behalf of a trader or a representative body of traders or of a road carrier or representative body of road carriers. If, however, the Tribunal after a public hearing of the matter arrives at the conclusion that the agreement should be approved, then the rates and conditions of service specified in the agreement become the prescribed rates and conditions, and it is a condition of the licence of every road carrier to comply with the agreement. If he fails to do so his licence may be suspended or revoked. If, on the other hand, a railway company fails to observe the agreement, the Tribunal has power to enforce it by way of the machinery provided in the 1854 Act for the abatement of an undue preference. The T.A.C. suggests, not as part of the proposed legislation, but as a sort of gentlemen's agreement, that the traders should be consulted about these agreements before they are referred to the new Tribunal.

It would appear that these recommendations involve a new departure in the law of competition and monopoly. It is quite true that the public hearing which is to be given to objections raised by outsiders represents a certain safeguard to those who might be willing and able to supply road

services at rates lower than those contained in the agreement. Yet, if once after an elaborate mutual consultation of organised road and rail interests rates and conditions of services are settled, the *favor judicis* is likely to be on the side of the agreement and not against it. In approving the suggestion contained in the agreement between the Liaison Committee and the Railway Companies, the T.A.C. has definitely decided in favour of a system of regulated prices against free competition, but the regulation is primarily within the province of the private interests concerned, and not within the jurisdiction of those who represent the public. Legally speaking, the organised rail and road interests have been made part of the legislative machinery. The antimonopolist restrictions imposed on the railways will be replaced by a system of restrictions imposed on outsiders in the road industry by the joint action of organised interests and a judicial tribunal. The creation of standards of conduct by administrative tribunals is, of course, well known in other branches of the law, but the decisive influence given to organised interests on the fixing of those standards is particularly noticeable in these new recommendations.

Even more important than the position of outside road carriers is the question of the protection of the consumers. It is, in fact, threefold. The composition of the new Road and Railway Rates Tribunal with its independent chairman and the two representatives of commerce (the addition of a second member experienced in commercial affairs is a very important modification of the original proposals introduced by the T A.C. itself, see s. 47, III), leaves the carriers themselves in the minority. The consultation with commercial interests before reference to the tribunal and the public hearing of objections raised by traders are additional safeguards. In spite of all this, however, there remains a lingering doubt whether the consumers will not be most detrimentally affected by this new machinery for the fixing of railway and road rates. The paramount principle to govern the fixing of railway rates by the R.R.T. is to be that those rates must be reasonable. It is provided in the recommendations (s. 48) that, when considering the question of reasonableness, the R.R.T. must have regard also to any charges agreed with other forms of transport (including those approved by the proposed Road and Railway Rates Tribunal) with a view to avoiding uneconomic transport charges. Will it be possible, legally and in fact, for the R.R.T. to declare unreasonable a railway rate based on an approved agreement with the organised road hauliers? Is it not likely that these agreements concluded between two groups of carriers will set the standard for what is to be the legal duty of the traders towards the railway companies? Does not the mutual protection against undercutting afforded to rail and road alike nullify the safeguards which the T.A.C. proposes to give to the traders against an abuse which the railway companies may possibly make of their new freedom? It would seem that, to a certain extent at least, at the very moment when the law for the first time gives effect to the railway companies' position as competitors in the market, that competitive position very largely disappears through the creation of a legal monopoly of combined rail and road interests. With some exaggeration one may say that, if these proposals become law, Parliament will have gone the whole way from antimonopolist to promonopolist legislation and not, as was claimed by the railways in their Square Deal agitation, restored the freedom of competition.

This will be the first attempt at statutory regulation of road charges. It is remarkable that this first step is in the direction of self-imposed

restrictions as far as organised interests are concerned, coupled with a considerable amount of subjection of outsiders to these organised interests.

V

The transformation of the modern legislative process is reflected in the way in which the T.A.C. arrived at its recommendations, and also in those recommendations themselves.

In November, 1938, the Railway Companies Association submitted a memorandum to the Minister of Transport, embodying the proposals commonly known as the Square Deal Demands. These were further supplemented by a memorandum submitted early in December (Appendices 1 and 2). On December 12th, the Minister of Transport remitted these proposals to the T.A.C. and in January the Railway Companies addressed a further memorandum to the T.A.C. by which they further modified their demands (Appendix V). Further memoranda were submitted in the same month to the Council by the British Road Federation, the Scottish Commercial Users Association and the Traders' Co-ordinating Committee on Transport (Appendices XVI, XVIII, and XIX). In February, however, agreements had been reached between the Railway Companies and the Liaison Committee on Road Transport Rates (Appendix VI), the Canal Representatives (Appendix VII), the Dock and Harbour Representatives (Appendix VIII), the Coastal Carriers (Appendices IX and X), the general trading interests (Appendix XI), the Iron and Steel Federation (Appendix XII), and the agricultural representatives (Appendix XIII). The recommendations of the T.A.C. summarised in this article are essentially based on the contents of these agreements.

This history of the origin of legislative proposals destined to be accepted by Parliament throws some light on the way in which agreements of organised interests underlie legislation in a modern democracy. The public interest, in so far as it is not represented either by any of the organisations parties to these agreements or in the T.A.C. itself, have, of course, an opportunity of being heard in Parliament, but is it likely that they will succeed in modifying proposals backed by the force of a bargain between all the organised interests concerned? Is there not a certain parallel between legislative measures of this kind and those "agreements" between the "estates of the Realm" which were the form of legislation on the Continent in pre-constitutional days? After all, something may be said in favour of the theory which urges "the pluralistic character" of the modern state.

The same line of thought is suggested by the proposals themselves. Again we see how a bargain between organised interests has a tendency of acquiring the form of law. In the strict legal sense of the word the organisations on all sides become instruments of the legislative process. The outsider and, very largely, the unorganised consumer, obtains a hearing, but no more. Is this the solution of the problem monopoly versus competition from the point of view of legislative machinery?

The "Square Deal" problem raises issues not only of an economic description, but also affecting the most fundamental problems of government.

O. KAHN-FREUND.

THE BANK FOR INTERNATIONAL SETTLEMENTS AND THE CZECH GOLD ASSETS HELD BY THE BANK OF ENGLAND

The facts leading up to this controversy can be summarised shortly. The B.I.S. held certain assets for the former Czechoslovak National Bank, which it deposited in the form of gold with the Bank of England. At a date not yet disclosed, following the establishment of the German protectorates in Bohemia and Moravia, the B.I.S. gave instructions to the Bank of England to hand over these assets either to the German Reichsbank or to the new Bank of Bohemia and Moravia. It is understood that these instructions have been obeyed.[1]

I. The case raises a number of legal points which are worth examination: for instance, the legal status of the B.I.S., the control of the signatory States over the board of the B.I.S., or the extent of the immunities of property granted to the B.I.S.[2] Limited space precludes more than an examination of the question whether the action of the B.I.S. can be challenged before a competent court by any of the States' signatories of the Agreements of 20th January, 1930, and on what grounds.

II. As the Bank of England held the gold on the orders of the B.I.S., it must be admitted that these assets are immune from measures of national legislation which might, in regard to holdings of this kind, extend the scope of the Czechoslovakia (Restrictions on Banking Accounts &c.) Act, 1939 (2 & 3 Geo. VI, Ch. 11), in accordance with Article X of the Agreement of 20th January, 1930, between Belgium, France, Germany, Great Britain, Italy and Japan,[3] with No. 6 of the Constituent Charter of the B.I.S., embodied in the Convention between the signatories of the above agreement and Switzerland,[4] and with Article I of the Brussels Protocol of 30th July, 1936.[5]

III. Article 2 of the Convention of 20th January, 1930, between Switzerland and the signatories of the Convention mentioned above under II provides for arbitral settlement of any dispute between Switzerland and any of the other signatories "relating to the interpretation or application of the present Convention."

The Constituent Charter of the B.I.S. and the annexed Statutes are part of the Convention.[6]

The Arbitral Tribunal for which provision is made in the Convention is established under the Agreement referred to above under II. The tribunal is composed "of five members appointed for five years, of whom one, who will be the Chairman, shall be a citizen of the U.S.A.; two shall be nationals of States which were neutral during the late war; the two others shall be respectively a national of Germany and a national

[1] *Hansard*, House of Commons, vol. 347, cols. 1927, 2092; *The Economist*, 1939, p. 495; *The Times*, 13th June, 1939.

[2] For a discussion of these questions, see Sir John Fischer Williams, "The Legal Character of the B.I.S.," A.J.I.L., 1930, p. 665 *et seq.*, and the present writer's *Die Internationalen Banken für Zahlungsausgleich und Agrarkredite*, Berlin, 1932.

[3] Cmd. 3763 (1931), p. 8.

[4] Cmd. 3766 (1931), p. 4.

[5] Cmd. 5344 (1937), p. 4.

[6] See the monograph quoted above in note 2, p. 17 *et seq.*

of one of the Powers which are creditors of Germany." A further paragraph makes provision for vacancies resulting, *inter alia*, from the expiration of the five-yearly periods of membership. Annex XII deals with details of procedure. According to Article 2 of the Convention with Switzerland, that country too may appoint a member in disputes in which she is involved.

Switzerland, as the State in which the B.I.S. is domiciled, would incur international responsibility if she permitted activities of the B.I.S. involving a violation of the Charter and Statutes of the B.I.S.

The Convention with Switzerland provides that she can bring any dispute with the B.I.S. regarding the interpretation or application of the Charter of the B.I.S. before the same tribunal (No. 11 of the Constituent Charter). As No. 2 of the Charter sanctions the annexed Statutes of the B.I.S., any dispute regarding the interpretation and application of the Statutes of the B.I.S. must be regarded as a dispute on the Charter of the B.I.S.

The Bank of England can bring a dispute involving the interpretation or application of the Statutes of the B.I.S. before the same tribunal in accordance with Article 56 of the Statutes of the B.I.S.

IV. The articles of the Statutes of the B.I.S., the interpretation or application[7] of which is involved, are Articles 22c (custody of gold for the account of central banks), 22j (other deposits from central banks), 22k (B.I.S. as agent of central banks) and 58 (definition of central bank in the meaning of the Statutes). For it is maintained that, in treating the Reichsbank or the Bank of Bohemia and Moravia as the successor to the former Czechoslovak National Bank, the B.I.S. has wrongly interpreted and applied these Articles of its Statutes.

V. The real question at issue is whether the B.I.S. is either entitled or bound to regard the Bank of Bohemia and Moravia or the Reichsbank as the owner of the gold held on behalf of the former Czechoslovak National Bank. This can only be decided on the basis of international law.

With regard to Switzerland, any League member signatory to the Convention can maintain that the recognition of the new Bank of Bohemia and Moravia or of the Reichsbank as successor to the former Czechoslovak National Bank is incompatible with Switzerland's obligations under Article X of the Covenant as interpreted by the League Assembly in its resolution of 1932. For the obligations undertaken thereunder by League members exclude recognition of situations created in contravention to the Covenant. Even assuming that League members are entitled *de facto* to recognise such changes in the *status quo*, a limited recognition of this kind would not cover the property of the annexed State or of any public corporation in foreign countries.[8]

It cannot be maintained that these contractual obligations are not opposable on the part of Switzerland or the B.I.S. to Germany as a non-member State. For Germany, as a signatory of the Treaty of Versailles, of which the Covenant forms part, is bound to admit the legality of any

[7] On the extensive interpretation of the term "application" by the Permanent Court of International Justice, see the judgments in the cases of the *Mavromatis Jerusalem Concessions* of 26th March, 1925 (A5, p. 47) and the *Factory at Chorzow* of 26th July, 1927 (A9, p. 24).

[8] H. Lauterpacht, *Receuil des Cours de l'Académie de Droit International*, t. 62 (1937), p. 296; the same writer in the previous issue of this Review, p. 9, note 14, and Oppenheim-Lauterpacht, *International Law*, vol. I (1937), pp. 139, note 4, 141, and 326.

action by League members which results from their obligations in this capacity. As Germany has never withdrawn her signature to the Treaty of Versailles as such, she must admit this limitation of the freedom otherwise enjoyed by non-member States.[9] In favour of this thesis we can quote German authors such as Professor Herbert Kraus, who was in close touch with the German Foreign Office during the Weimar Republic, and who was Professor of International Law at Göttingen University under the Nazi regime until 1937. He writes: "Germany is above all now prevented from raising objections against the League activities with regard to non-members if these activities are based on the Covenant."[10] It is also interesting to note that von Bülow, who held one of the key positions in the German Foreign Office, comes to the same conclusion: "As already mentioned, Germany and the other defeated Powers of the World War have recognised the competence of the League. In doing so, they have, however, not acquired the protection of the League."[11] It follows that the B.I.S. has to apply international law as valid between League members when deciding whether the Bank of Bohemia and Moravia or the Reichsbank is the successor to the former Czechoslovak National Bank. It is therefore submitted—

(1) that the arbitral tribunal established under the Agreement of 20th January, 1930, is competent to decide a dispute on this question

(*a*) between any of the signatories and Switzerland;
(*b*) between Switzerland and the B.I.S.;
(*c*) between the Bank of England and the B.I.S.;

(2) that the dispute is concerned with the interpretation and application of the Statutes of the B.I.S.;

(3) that, in transferring the holdings on behalf of the former Czechoslovak National Bank either to the Bank of Bohemia and Moravia or to the Reichsbank, the B.I.S. has wrongly interpreted and applied its statutes.

G. SCHWARZENBERGER.

[9] For a fuller discussion see the present writer's *The League of Nations and World Order. A Treatise on the Principle of Universality in the Theory and Practice of the League of Nations*, London, 1936, pp. 105 *et seq.*

[10] *Vom Wesen des Völkerbundes*, 1920, p. 38 *et seq.*

[11] *Der Versailler Völkerbund*, 1923, pp. 185, 186 and 278.

REPORTS OF COMMITTEES

The Official Secrets Act—Report of the Select Committee 1939

This committee was appointed as a result of the *Sandys Case* in June, 1938. A discussion of the case and of the committee's report thereon will be found in the MODERN LAW REVIEW, Vol. II, pages 163 and 231. The present report makes no further mention of these matters, and is confined to an examination of the Official Secrets Acts, 1911 and 1920, in relation to their bearing upon privilege of Parliament.

It is freedom of speech which is principally in issue and the committee express the decided opinion that this privilege protects Members of Parliament from prosecutions under the statutes in question so far as words spoken in debate or in the course of Parliamentary proceedings are concerned. The argument that privilege cannot protect against a criminal offence is brushed aside with the ingenious reply that crimes committed by a member otherwise than in his capacity as a Member of Parliament will not be protected. This test may not be so easy to apply as appears at first sight; for example, would it have furnished a valid defence to a prosecution for assault in the recent case where during the proceedings of the House of Commons one member struck another?

The only question in regard to this part of the discussion on which the committee are hesitant is as to the scope of the term "proceedings in Parliament." They are clear, however, that it goes so far as to cover "both the asking of a question and the giving notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either house." They think that there may be cases where the privilege goes still further, but beyond referring to communications passing between members or between a member and a minister, which they think in certain cases would qualify for privilege, they are rightly hesitant to hazard any opinions. It will be observed, however, that the actual incidents of the *Sandys Case* are covered by these passages of the report. On the other hand, they have no doubt that a member who discloses official secrets in a speech to his constituents has no claim for protection.

Perhaps the most troublesome question discussed is as to how far s. 6 of the 1920 Act applies to Members of Parliament. This section imposes the duty of giving information to the police about offences or suspected offences. The point here would be most likely to arise, as in the *Sandys Case*, where some speech made in Parliament indicated that the speaker had received information which could only have come to him after an offence under the Acts. The committee are hesitant upon this topic, which is in the writer's view of greater practical importance than they will allow, and this part of their report is the least satisfactory. They appear to think that such a case is not directly covered by parliamentary privilege, although indirectly the member might obtain some protection from the rule that no evidence can be given of debates or proceedings in Parliament except by leave of the house in which they took place. The committee also mention various reasons why in their opinion the question is not likely to come to an issue, overlooking the fact that it is pretty obvious that these safeguards would not have operated in the *Sandys Case* itself but for the energy and courage of Mr. Sandys. Nor do we think that their

confidence in the Bill at present before Parliament to modify the operations of the Official Secrets Acts is altogether justified. The truth is that modern political developments call for new extensions in the domain of parliamentary privilege, and it is a pity that the committee did not face up to this fact more frankly.

The committee express the important opinion that parliamentary privilege can only be abrogated by express words in a statute, a view shared by the law officers: this in reply to a suggestion that the Official Secrets Acts had by implication removed the privilege in respect of the matters within the mischief of the statutes.

Finally, we may note the use made by the committee in reaching their decisions of American and Canadian case law. The problem of securing full liberty of discussion in sovereign democratic assemblies is essentially the same in all countries. It is, nevertheless, interesting to find that the mother of parliaments is not above making use of the experiences of her daughters, a phenomenon which is perhaps observable in other walks of life at the present time.

R. S. T. C.

Law Revision Committee Eighth Report (Contributory Negligence)

The present Report shows no wavering or disagreement in recommending a reform which has long been felt to be overdue, by a consensus of legal opinion in the country. Its conclusions are best summarised in the Committee's own words—

> "That in cases where damage has been caused by the fault of two or more persons the tribunal trying the case (whether that tribunal be a judge or a jury) shall apportion the liability in the degree in which each party is found to be in fault."

This recommendation is designed to bring the Common Law into line with the Admiralty Law. The practical superiority and justice of the Admiralty Law, as laid down in s. 1 of the Maritime Convention Act, 1911, in accordance with the International Convention signed at Brussels in 1911, has hardly ever been doubted. But the Committee rightly points out that the ability to apportion the blame has also made it possible for the Admiralty judges largely to ignore the causation problem with which Common Law judges, owing to the very iniquity of the Common Law rule, have been faced. True, the Admiralty Law, like the Common Law, recognises the doctrine of the last opportunity whose principal object it was to allocate responsibility to one party only. But under the stress of modern developments, in particular the growing rapidity of modern traffic, which in most accidents eliminates the time interval between the acts or omissions of the two parties, both Common Law and Admiralty Courts had gradually modified the doctrine and substituted for the last opportunity test the question who was substantially responsible for the accident.[1] The decisive difference was that Admiralty Courts, since 1911 at any rate, could find that both parties contributed to *cause* the accident, and, on that basis, could proceed to allocate liability in proportion to the degree of negligence to each side; whereas the Common Law Courts, compelled to allocate liability to one side only, tended to mix up questions of causation and of responsibility. The Report traces and approves the development

[1] *Cf.* 1 M.L.R. 318, ssq.

which from the "last opportunity" test as formulated in *Davies* v. *Mann* has led to the modern test (mainly through the *Volute case*,[1] *Swadling* v. *Cooper*,[2] *McLean* v. *Bell*[3] and the *Eurymedon*[4]) which, as submitted in an earlier contribution to this journal[5] is: "Who is substantially responsible for the accident." (Up to this point Admiralty and Common Law go the same way, but then they must part company, as the law stands at present. Admiralty can apportion, Common Law must ignore, the minor guilt of the one side and allocate full liability to the side with the major guilt. Where the guilt is roughly equal, as in so many accidents, the solution must be arbitrary.) The Report substantially follows the same line of reasoning, but it is respectfully submitted that it introduces an element of confusion, by stating (p. 16)—

> "The question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?"

This, it is submitted, goes back, in form at least, to earlier decisions like *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 219, which, by distinguishing between proximate and remote cause, etc., tried to solve the problem in terms of causation. But leading textbooks as well as recent decisions have recognised that the latter cannot be solved by causation theories, since in practically all cases of contributory negligence which come to the Courts, both parties have caused the accident, and the question is one of weighing responsibilities. The matter has been most clearly formulated by Lord Wright in *McLean* v. *Bell* (1932), 147 L.T. 262—

> ". . . as matter simply of causation her acts formed a necessary element in the final result, since without them no accident could have occurred. The decision, however, of the case must turn not simply on causation but on responsibility; the plaintiff's negligence may be what is often called *causa sine qua non*, yet as regards responsibility it becomes merely evidential or matter of narrative, if the defendant acting reasonably could and ought to have avoided the collision."

Scott, L.J., in the *Eurymedon* (1938), P. 41, pp. 57–8, argued in the same vein. Lord Sumner in *Loach's Case*,[6] on the other hand, uses somewhat contradictory language, when he says—

> "The question is one . . . of the cause legally responsible for the injury. . . . It (the inquiry) is in search not merely of a causal agency but of the responsible agent."

In substance there is probably little disagreement that what matters is responsibility, since a satisfactory test by which to distinguish legally relevant from legally irrelevant causation has not and will not be found. Once the Committee's recommendation is adopted, Common Law Courts, too, will worry little about causation and get busy about apportioning blame. But for the teaching of the law it would, it is submitted, have been helpful if the Report had unmistakably stated what recent decisions have emphasised, that contributory negligence cases are only such cases where

[1] [1922] 1 A.C. 129.
[2] [1931] A.C. 1.
[3] [1932] 147 L.T. 262.
[4] [1938] P. 41.
[5] 1 M.L.R. 138.
[6] [1916] 1 A.C. 719.

both parties have caused the accident, whether they cause it by interdependent or by independent acts, and that the task of the Court is to weigh responsibilities.

Apart from the learned and interesting account of the development of the law of contributory negligence, the Report contains some further noteworthy observations. It states that there is no reason why the principle of apportionment should not be extended to all torts where contributory negligence is a relevant factor, and not be confined to the tort of Negligence. Thus it ought to apply to negligent injury to person or property (but not, of course, to such torts where it is immaterial whether they be committed intentionally or negligently, like Defamation). As the Report rightly says, there is no reason why it ought not also to apply where the injury results in death (in fact, it is difficult to see any problem at all in this question). On the other hand, the recommendations do not extend to the Workmen's Compensation Act, which occupies, of course, a special position and has special provisions, to which the principles of apportionment would not be applicable in the same way as to contributory negligence.

W. Friedmann.

NOTES OF CASES

Tort Committed on British Ships on the High Seas

Canadian National Steamship Co. v. *Watson*, [1939] 1 D.L.R. 273, is a decision of the Supreme Court of Canada (on appeal from the Quebec Court of King's Bench, Appeal Side: 64 Que. K.B. 11) which is worthy of attention from English lawyers at a time when the International Maritime Committee has under consideration the question of torts committed on the high seas. The action was by a seaman (the respondent) against his employers, the owners of the British ship registered at Vancouver, British Columbia, on which the plaintiff was serving when he was injured through the negligence of a fellow servant. At the time of the accident the ship was on the high seas.

The well-known dicta of Lord Macnaghten in *Carr* v. *Fracis Times & Co.*, [1902] A.C. 176, 186, and of Willes, J., in *Phillips* v. *Eyre*, L.R. 6 Q.B. 1, 28, express the law of the Province of Quebec, the *lex fori* in the case noted, applicable to an action for damages in respect of personal injuries due to a tortious act committed outside that Province: *O'Connor* v. *Wray*, [1930] 2 D.L.R. 899. It is therefore essential that the plaintiff prove an act or default actionable by the law of Quebec and "not justifiable" by the *lex loci delicti*. The Chief Justice of Canada, delivering the judgment of himself, Crocket, Kerwin, and Hudson, JJ., said that "justifiable" here refers to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than "justifiable" within the meaning of the rule: see *Walpole* v. *Canadian Northern Railway Co.* (1922), 70 D.L.R. 201, 205, [1923] A.C. 113, 119.

While it is part of the plaintiff's case to establish that the tort charged is non-justifiable by the *lex loci delicti* in the sense mentioned, he is entitled to call in aid the presumption of law that the general law of the place where the alleged wrongful act occurred is the same as the *lex fori*. If the defendant pleads as a defence some difference between the law of the locality and the law of the forum the onus is upon him to prove it.

Among other defences, the appellants pleaded that as the ship was British the law governing their liability for acts done by officers and crew on board the ship was the English Common Law, by which they were under no liability because of the doctrine of common employment. That doctrine is not part of the law of Quebec.

The respondent contended that the case was governed by s. 265 of the Merchant Shipping Act, 1894, which is in force in Quebec. That section provides that where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in the Second Part of the Act any provision on the subject which is thereby expressly made to extend to that ship, the case is to be governed by that provision; but if there is no such provision, the case is to be governed by the law of the port of registry. The Chief Justice of the Quebec Superior Court held that the section applied, that the law applicable was therefore the law of British Columbia, and that, as the law of British Columbia was neither pleaded nor proved, he was bound to give judgment on the assumption that the law of that Province is the same as the law of Quebec. Consequently the doctrine of common employment, which in fact is contained in the law of British Columbia, afforded no defence to the action.

This view of the law was upheld by the Quebec Court of King's Bench (Appeal Side) and, on further appeal, by the Supreme Court of Canada.

Mr. Walter S. Johnson states in his *Conflict of Laws with special reference to the law of the Province of Quebec* (Vol. III (1937) at p. 400) that the general principle with regard to torts (other than those arising from collisions) on the high seas is that "when one person does injury to another on board a ship on the high seas, the act is governed by the law of the country to which the ship belongs." The same view is stated, also without qualification, in *Halsbury's Laws of England* (Hailsham Ed., Vol. VI, p. 282), Cheshire's *Private International Law* (2nd Ed., p. 306), and Dicey's *Conflict of Laws* (5th Ed., pp. 777, 778). *Cf. Restatement of the Law of Conflict of Laws*, s. 406; J. H. Beale, *Conflict of Laws*, Vol. II, p. 1329, s. 406. The law of the country to which the ship belongs is usually stated to be the law of the flag, but this does not necessarily coincide with that of the port of registry or with that of the "home port." The port of registry commends itself because it must be unambiguous, while the "home port" may be doubtful, although a ship generally has more real connexion with this than with the port of registry. In the case noted application of the statutory provision qualifies the suggestion of Professor Dicey (*op. cit.*, p. 777, note (*e*)) and Dr. Cheshire (*op. cit.*, p. 306) that the English law of torts applies to British ships not in territorial waters, and it supplies Dicey's question (*ibid.*) on the law applicable to a British ship registered in Scotland an answer which appears to be contrary to that writer's expectations. Dr. Cheshire also states (*op. cit.*, p. 306) that in an action in England on a tort committed on a foreign ship on the high seas the plaintiff must prove that the act is actionable by the law of the flag and is also actionable by the law of England, but *Canadian National Steamships Co.* v. *Watson* (*supra*) serves as a reminder that an English Court seised of an action concerning a foreign tort takes judicial notice of the actionability under English law once the facts are proved, and the *lex loci delicti* is, in the absence of evidence to the contrary, presumed to be the same as the *lex fori*.

M. E. Bathurst.

International Effect of Currency Restrictions

It is hardly possible to over-emphasise the commercial and legal importance of currency restrictions in the present world. A large and increasing proportion of international trade is done with and between countries the inhabitants of which are not free to fulfil their commercial engagements without some sort of official authority and are precluded from disposing of their foreign assets. The legal questions which arise from these restrictions are manifold and extremely complicated, and an almost terrifying body of case law has grown around them, on the Continent as well as in America. In view of the prominence of international trade in the commercial life of this country it is somewhat surprising to find that the English Courts have had very little opportunity, so far, of pronouncing upon the international effect of currency restrictions, though a considerable part of British exports goes to countries labouring under currency legislation and a not insignificant part of the commercial credits granted by City houses is affected by such laws.

It was the typical international financial transaction known as "acceptance credit" which came before Branson, J., and the Court of

Appeal in *Kleinwort, Sons and Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Creditbank*, [1939] 2 All E.R. 782 and [1939] 3 All E.R. 38. The plaintiffs, a firm of London bankers, had agreed to accept bills of exchange drawn on them by the first defendants who had promised to provide on maturity the funds covering the amount of the bills. This promise had been guaranteed by the second defendants, one of the leading Hungarian banks. These credit facilities had been opened long before 1931 when currency restrictions were for the first time introduced in Hungary. Simultaneously, and in close connection with the currency legislation, a committee of English and other foreign bankers entered into a standstill agreement with the Hungarian National Bank by which they undertook for one year not to cancel credit facilities granted to Hungarian firms. The standstill agreement was renewed from year to year and the plaintiffs adhered to it until 1937, when they declined to enter into the renewed standstill agreement then concluded. The practice of accepting new drafts for those which had matured was, however, continued, and so were the guarantees given by the second defendants. Thus a number of bills were accepted by the plaintiffs in April, 1938, and when they matured in July, 1938, and the plaintiffs refused to renew their acceptances, the first defendants failed to provide cover and the second defendants did not implement the guarantee. Thereupon the plaintiffs sued both defendants for the amount of the acceptances.

The defendants relied in the first place on a letter which had been regularly sent to the plaintiffs and which was to the effect that both defendants would only be in a position to provide cover on maturity if the exchange regulations prevailing in Hungary at that date would enable them to do so. The Court had no difficulty in disposing of the argument that this letter limited or "conditioned" the promise to provide cover. It was nothing but an intimation that in certain circumstances they would be unable to perform their contract, but it in no way impaired the validity and the absolute character of that promise.

The second defence, however, gave the Court an opportunity of elucidating some important points of international currency law. Both defendants contended that, by reason of the Hungarian currency legislation, it was illegal for them to pay sterling in London without the permission of the Hungarian National Bank, and that that consent had been refused. They were, so they said, prevented by law from either sending money out of Hungary, or from disposing of any assets they held in England or in a third country, and they alleged that this constituted an illegality of performance according to the law of the country in which they resided. They argued that an English Court could not compel them to do an act by which they violated the laws to which they were subjected.

The legal relevance of this defence obviously depended in the first place on the question, which system of law was applicable to the contract between the parties. If Hungarian law governed the contract, performance was illegal by the proper law, and the plaintiffs could only succeed if the English Courts refused to apply the Hungarian currency legislation, either on the ground that they were against English international public policy, or because they were foreign revenue laws which an English Court would decline to enforce. If, however, English law was to be applied, the Hungarian legislation could assist the defendants only if they could bring themselves under the rule laid down by the Court of Appeal in *Ralli Brothers* v. *Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287.

Branson, J., and the three Lord Justices in the Court of Appeal were unanimously of the opinion that the proper law of both contracts before the Court was English. It was in the English language, and English law was the *lex loci contractus* as well as the *lex loci solutionis*. This is in itself a ruling of great importance. In spite of the central place occupied by international acceptance credits in the daily routine business of the City, no English Court had ever before decided that English law governed these transactions. It is unnecessary to point out that this question has nothing to do with the principles of Private International Law applicable to bills of exchange themselves which are contained in s. 72 of the Bills of Exchange Act, 1882, and in such decisions as *Embericos* v. *Anglo-Austrian Bank*, [1905] 1 K.B. 677, and *Koechlin* v. *Kestenbaum*, [1927] 1 K.B. 889. The case under review was concerned with the acceptor's contractual right to be indemnified by the drawer for whose accommodation he has accepted a bill and this, of course, is not a right arising from the bill itself. Yet, though legally quite separate from the bill, the contract between drawer and acceptor which underlies the acceptance is commercially closely connected with the bill, and it is worth while to reflect on the position of the English acceptor of a bill drawn abroad, taken as a whole, i.e. on the combined effect of the present decision and the principles of the law of bills of exchange. If the ultimate holder is, as usual in such cases, an English discounting house, the English acceptance house is unlikely to be affected by any questions of foreign law, with this exception that the interpretation and essential validity of a foreign endorsement is governed by the law of the place where the endorsement was made.

The defendants argued that even if English law was the proper law, the contract had become unenforceable under the well-known rule laid down by the Court of Appeal in the *Ralli* case. In rejecting this defence, MacKinnon, L.J., emphasised that supervenient illegality under foreign law can only excuse performance if that foreign law is the *lex loci solutionis*. "This is no contract to do anything in Budapest, or elsewhere in Hungary. It is a contract to do something in London. . . . If this contract had been to pay money in Budapest, no doubt that principle (the *Ralli* Rule) would have applied. The law of Hungary would have been the *lex loci solutionis*. In this case, however, the payment of the money was to be made in England, and English law is the *lex loci solutionis*." The *Ralli* principle does not enable a debtor under an English contract to rely on the law of his nationality or domicil or residence. Whatever any of these systems may have to say about the legality of the performance is quite immaterial. The *Ralli* case does not introduce the "*statut personnel*" into the law of contracts. It is otherwise, of course, if any one of these systems happens to be the *lex loci solutionis*. This is the true purport of the *Ralli* principle and "a very emphatic negative" was given by du Parcq, L.J., to the defendants' suggestion that a foreign sovereign could prevent his subjects from performing their English contracts outside the territory of the sovereign. Whether or not that performance necessitates the doing of an act within the territory of the foreign sovereign which infringes his law is quite irrelevant. Any other decision would violate the most elementary principles of the comity of nations, as was pointed out both by Branson, J., and by du Parcq., L.J.

The true basis of the *Ralli* rule is still in the dark. Does English municipal law imply a contractual term that performance shall be excused, if forbidden at the place of performance or does English Private International

Law submit the legality of the performance to the *lex loci solutionis*? Du Parcq., L.J., observed that this may make a difference in a case in which a party expressly undertakes to perform a contract in a foreign country, whatever the law of that country may say about the legality of the performance. An express undertaking of this kind would displace the *Ralli* rule, if the latter operated as an implied term only, and the party would be liable to perform the contract though performance was illegal at the *locus solutionis*. If, however, as Dicey (*Conflict of Laws*, 5th ed., Rule 160, Exception 3) thinks, the legality of the performance is governed by the *lex loci solutionis* as such, then an undertaking to violate this law would be void. The learned Lord Justice preferred to follow Dicey and to state the rule as a principle of Private International Law, but it was not necessary to decide this point in the case before the Court. Whichever be the true interpretation, it is notable that Branson, J., was inclined to restrict the scope of the rule to cases in which performances *of necessity* involves the doing of an act infringing the *criminal* law of the foreign state.

The defendants also relied on the well-known dictum of Lord Sankey, L.C., in *De Béeche* v. *South American Stores Ltd. and Chilean Stores Ltd.*, [1935] A.C. 148, 156, that "it can not be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has resolved it illegal to do." These words were given a restrictive interpretation both by Branson, J., and by the Court of Appeal. The dictum is nothing but a re-statement of the *Ralli* rule, i.e. it must not be read as if it extended the scope of foreign currency legislation to cases in which that legislation does not form part either of the proper law of the contract or of the *lex loci solutionis*. It was also made quite clear by Atkinson, J., in the course of the argument before the Court of Appeal, that Chilean law was the proper law in the *De Béeche* case, so that the case itself is deprived of much of its importance as a precedent. (See on this point Mann, *Legal Aspect of Money*, p. 264.) The result is that a person resident in a country with currency restrictions can be compelled to satisfy out of his foreign assets contractual debts subject to English law which are to be performed outside his own country, although he is forbidden by his own law to dispose of those assets.

The effect of foreign currency laws in cases in which the currency restriction forms part either of the proper law or of the *lex loci solutionis* is still far from clear. Even if Hungarian law had been the proper law of the contracts before the Court, it might have been against English international public policy to allow the Hungarian debtors to shelter themselves behind the walls of the Hungarian currency legislation. It was suggested in the course of the argument by du Parcq., L.J., that foreign currency legislation might stand on the same footing as foreign revenue laws which English Courts will not enforce, but as Hungarian law had no claim to be applied at all, it was unnecessary to follow up this line of reasoning. The question remains open, whether English Courts will allow a defendant successfully to plead a foreign currency law as a defence against a contractual claim, if the contract is governed by that foreign law and—unlike the contract in *De Béeche's* case—to be performed in this country. This question goes to the root of the matter. There are strong reasons why such a defence should be rejected, although they may have to be found in the general principles of *ordre public international* and of the strictly territorial effect of confiscatory laws rather than in the special rules applicable to

revenue laws. (On these points and on the Continental and American case law, see Mann, *op. cit.*, pp. 261–268, also the recent article by Weiden, "Foreign Exchange Restrictions," *New York University School of Law, Contemporary Law Pamphlets*, Series 1, No. 11).

O. KAHN-FREUND.

Wages Re-gained and Lost.—Workmen's Compensation Act and National Health Insurance Act

Though *Marrison* v. *Bell*, [1939] 1 All E.R. 745, decides only a small point it may in the future be regarded as the beginning of a new approach to the law of master and servant. The facts are of the simplest kind. The plaintiff had for many years been employed as a salesman in the defendant's business, where he received a weekly wage of some £3. On 4th December, 1937, he was taken ill, and did not return to work until 26th March, 1938, when he was given a week's notice to terminate employment. During his illness the plaintiff had received sickness benefit under the National Health Insurance Act, 1936, but no wages. These he sought to recover by the present action. The defendant pleaded the panacea of the implied term according to which no wages were due during sickness, and, in the alternative, breach of contract; the County Court Judge accepted the first plea and dismissed the action. On appeal that judgment was upset, and it was held, following the line of cases beginning with *Cuckson* v. *Stones* (1858), 1 E. & E. 248, that sickness did not terminate the employment, and that there was no implied term in contracts of employment relieving the employer from his obligation to pay wages during that period. Lastly, and this was the new point, the Court of Appeal held that receipt of sickness benefit under the National Health Insurance Act did not give the employer a right to withhold wages. It had been argued that benefits under that Act were in their nature similar to workmen's compensation, but Scott, L.J., who delivered the only judgment, held otherwise. The learned Lord Justice admitted that no wages were payable during receipt of workmen's compensation, but this did not apply to benefits under the National Health Insurance Act. These "are in their nature additional benefits conferred on the classes who come within the scope of those Acts, being mostly persons engaged as workmen. Those benefits are intended to be an addition to such financial emoluments as the workman may have during his life, to improve his position by giving him medical assistance, disablement benefit and others of a long list of additional benefits which will improve his lot. Those benefits are, in their nature, irrespective of the amount of wages as determined by the workman's individual contract of service. Rights are given independently of any relation between the rights and the wages as a general principle through the Acts, and there is absent—at any rate from most of the earlier Acts, and certainly from the Act of 1936—any such ground as there is in the Workmen's Compensation Act for supposing that Parliament intended by the Act which conferred the benefits of Health Insurance to take away from the workman any right to wages that he might have."

Lord Justice Scott also thought that his decision would not work any social hardship on employers, since they had a perfect right to give notice, and most persons were employed by the week only. Employers' organisations will no doubt be grateful for this hint.

It was mentioned in passing, but not decided, as unnecessary for this case, that illness may frustrate a contract of employment in special circumstances, e.g. *Poussard* v. *Spiers & Pond* (1876), 1 Q.B.D. 410.

The decision gives rise to the following observations. First as to its basis, the comparability of payments under the Workmen's Compensation Act and the National Health Insurance Act. Neither of these statutes says anything about wages paid under a contract governed by the common law, and, applying the canon of construction that a statute can only repeal the common law expressly or by necessary implication, there seems no valid reason why either of the above-mentioned Acts should disentitle the workman from claiming wages in addition to compensation or benefit, as the case may be. With regard to the Workmen's Compensation Act it may well be argued that since that Act expressly provided that no compensation should be paid where damages had been recovered at common law, and since the other common law right, namely, that to wages, was not mentioned, the statute did nothing to impair it. Indeed Cozens-Hardy, M.R., in *Warburton* v. *Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663, at p. 665, doubted the correctness of the decision in *Elliott* v. *Liggens*, [1902] 2 K.B. 84, where a Divisional Court had laid down that wages and workmen's compensation were incompatible. The latter decision has, however, perhaps stood unchallenged for too long to be overruled now.

Though Scott, L.J., did not say so in so many words this may have been in the back of his mind when he accepted that view, and it possibly influenced his subtle, if not altogether convincing, reasoning with regard to the difference between payments of compensation and benefit; not convincing because the result is accidental. It would have been quite possible for the framers of the National Health Insurance Act to grade the cash benefits according to the recipient's wages. Had that been so, and we are not entitled to inquire into the motives why it was not done, the reasoning in *Marrison* v. *Bell* would fall to the ground. The distinction seems therefore somewhat artificial.

This artificiality is increased by the vague reference to the intention of the legislature, which, we are told, in the one case did, and in the other did not, "intend" to exclude the right to wages. As long as we are forbidden to use any work preparatory to the statute it seems dangerous to allude to this at all, except in the clearest of cases. What it amounts to here is that Scott, L.J., no doubt on excellent grounds, believes it to have been the intention of Parliament.

The decision puts a new stone into the building of our law, and has been welcomed by many wage earners. Too great hopes should, however, not be raised, for in future employers will simply give one week's notice when an employee falls ill, and a job which otherwise might have been kept open for weeks, may now be lost in a few days.

Moreover, the case is a reminder of the weekly wage earner's insecurity in respect of the law governing his contract of employment, and it would seem that the time has come for a codification coupled with judicious reform on the lines of the Landlord and Tenant Act, 1927. If *Marrison* v. *Bell* should contribute to move the forces which might ultimately produce a Master and Servant Act, this case, though it probably takes away more than it gives to the worker, will have served a useful purpose.

O. C. Giles.

British and Palestinian Nationalities

The decision of the Court of Criminal Appeal in *R.* v. *Ketter* (55 T.L.R. 449) turned on the issue of whether a person, who was born a Turkish subject before the Mandate for Palestine came into operation, could claim British nationality. The Court held that the appellant was not a British subject.

As this case is the first in which a British Court dealt with the matter, it may be appropriate to examine in some detail the legal questions involved and the interpretations given by the Court of Criminal Appeal of the Treaty of Lausanne, of the Palestine Mandate, of the Palestinian Citizenship Order, 1925, and of the British Nationality Act.

1. Article 30 of the Treaty of Lausanne, in which Article 123 of the Treaty of Sèvres has been incorporated verbatim, stipulates that Turkish subjects habitually resident in territories detached from Turkey become *ipso facto* subjects of the State to which such territory is transferred.

It is commonly accepted that the situation created by the Treaty of Lausanne concerning the "A" Mandates can neither be interpreted as a cession nor as an annexation, but must be regarded as an act of dereliction on the part of Turkey, followed by the creation of an international trusteeship, to be exercised by the Mandatory on behalf of the League of Nations (A. D. McNair, "Mandates" in *The Cambridge Law Journal*, Vol. III (1928), p. 155; James C. Hales, "Some Legal Aspects of the Mandate System," *Transactions of the Grotius Society*, 1938, Vol. XXIII, p. 95 *et seq.*). It follows from this that the military occupation of Palestine by Great Britain has not led to the acquisition of sovereign power by the Mandatory over the mandated territory, since the Mandatory is exercising its rights under the mandate *alieno nomine*, and that, with the completion of the act of dereliction by Turkey, the former Turkish subjects habitually resident in Palestine lost their original Turkish nationality.

As Palestine was never transferred to the sovereignty of Great Britain, it must be assumed that Article 30 of the Treaty of Lausanne referred only to those other parts of Turkey over which other States were receiving full sovereign rights. (J. Stojanowski, *The Mandate for Palestine*, London, 1928, p. 263 *et seq.*). This interpretation of Article 30 was endorsed by the Court of Criminal Appeal.

2. The Court further held that none of the provisions (Preamble and Articles 1, 5, 7, and 12) of the *Mandate Treaty for Palestine* which were adduced by the appellant in any way supported the appellant's claim that "the true effect of this is that His Britannic Majesty accepted the mandate in respect of Palestine and undertook to exercise it on behalf of the League of Nations in conformity with the provisions contained in it" (at p. 450).

3. According to Part I (1) of the *Palestinian Citizenship Order*, 1925 (Statutory Rules and Orders, 1925, No. 777), made in exercise of the powers of the Crown under the Foreign Jurisdiction Act, 1890, Turkish subjects habitually resident in Palestine on August 1st, 1925, were to become Palestinian citizens. As, according to Article 7 of the Mandate, the administration of Palestine was to be responsible for enacting a nationality law, and as the Palestinian Citizenship Order was enacted by the Mandatory, the appellant maintained that at least the first paragraph of this Order was null and void, being in contradiction to Article 7 of the Mandate. It must be admitted that the Mandate Treaty distinguishes between functions entrusted on the one hand to the Mandatory (Articles 1, 2, 3, 5, 9–21, 24–26) and, on the other hand, to the Administration of

Palestine (Articles 4, 6, 7, 11, 15, 17, 18, and 23), but it cannot be sustained that the distinction amounts to more than a division of labour within one and the same administrative organisation, which may be modified at the discretion of the Mandatory (see the present writer's *Das Völkerbunds-Mandat für Palästina*, Stuttgart, 1929, p. 95).

The Court rejected this view, but expressed the opinion that, even granting this assumption, "the result would be that the appellant remained a Turkish subject and not that he became a British subject" (at p. 450). While fully concurring with the latter part of the statement, it is submitted that in view of Turkey's dereliction of Palestine (see above under 1), former Turkish subjects would have to be regarded as stateless, provided they had not acquired Palestinian citizenship (*cf.* McNair, *loc. cit.*, p. 155).

4. It follows from the legal status of the Mandatory that, at least in the case of an "A" Mandate, the appellant was not born "within His Majesty's dominions and allegiance," as this term is used in s.I. (I) (*a*) of the British Nationality and Status of Aliens Act, 1914 (4 and 5 Geo. V, c. 17) and 1918 (8 and 9 Geo. V, c. 38). For it can be regarded as an established principle that only a territory under the complete sovereignty of the Crown can be regarded as a British dominion (E. F. W. Gey van Pittius, *Nationality within the British Commonwealth of Nations*, London, 1930, pp. 20–21, 37 and 190). The appellant, therefore, was subject to such measures as were authorised against aliens in s. 2 (6) and 27 (1) in the British Nationality and Status of Aliens Act.

This position could not be affected by the fact that the appellant was in possession of a passport entitled "British Passport—Palestine," issued by the High Commissioner in Palestine. Although, as the jury added in a rider to its verdict, it is true that the words on the passport may prove misleading, the real meaning of this phrase becomes evident, if it is remembered that in accordance with Article 12 of the Mandate, the Mandatory is entitled to afford diplomatic and consular protection to citizens of Palestine when they are outside its territorial limits.

5. Finally, it may be stated that this decision, with which no fault whatsoever can be found, apart from the one minor point mentioned under 3, is fully in accordance with the rulings of the High Court of Palestine in *Attorney-General* v. *Goralschwili and Another* (*Annual Digest*, 1925–1926, Case No. 33), of the Egyptian Mixed Courts of 15th December, 1925, in *Saikaly* v. *Saikaly* (*ibid.*, Case No. 34) and of the High Court of Uruguay of 7th March, 1928 (*ibid.*, 1927–1928, Case No 27).

G. Schwarzenberger.

Income Tax Cases

The decision of the Court of Appeal in *B. C. Utting & Co. Ltd.* v. *Hughes*, [1939] 2 K.B. 231, when the decision of Macnaghten, J.—discussed at 2 *M.L.R.* 322—was reversed, is of considerable importance to speculative builders. It will be recalled that this case turned, *inter alia*, on the point whether unrealised freehold reversions, or more commonly "ground rents," were to be treated as part of the builder's stock in trade and brought into the credit of his accounts, like unsold houses, at cost or market value, whichever was the lower, or whether they represented part of the proceeds of the sale of the house and land, to be taken into account at the full market value, since ground rents are readily saleable.

The Court of Appeal held that the freehold plots of land on which the houses stood had not been realised as assets; they were still retained *unsold* subject to a term of 99 years and were therefore properly treated as the builder's stock in trade and valued at the lower cost price. The apparently contrary decision of the House of Lords in *Inland Revenue* v. *John Emery & Son*, [1937] A.C. 91—discussed at 1 *M.L.R.* 163—was distinguished on the ground that when a house and land is sold in Scotland for cash and a ground-annual (cf. the English rent-charge), the taxpayer has disposed of his *entire* interest in the land and has become merely the owner of a rent-charge, whereas, in *Utting*'s case, the builder still continued to be the owner of the land, subject to alienation of a *partial* interest represented by the term of years.

The interpretation thus placed on the decision in *Emery*'s case seems open to question; though *dicta* can be adduced to show that the case turned upon the speculative builders' disposal of their *entire* interest in the land, the real *ratio decidendi* appears to have been that, since the ground annuals represented part of the proceeds of the sale of the house and land, they fell to be taken into account at their full market value, even though they had not been actually realised for cash at the time the accounts were made up. If this latter was the real point on which *Emery's* case turned, then the House of Lords may be expected to take a similar view when *Utting's* case comes before it, since in both cases—as between the builders, as vendors and the purchasers—there had been completed transactions of sale, the consideration for which was a cash sum plus an annual payment, readily marketable for a lump sum, in the one case in perpetuity and in the other only for 99 years. The difference in period is not, it is submitted, a real distinction vitiating the principle laid down in *Emery's* case.

The Courts recently have been much occupied with the change made by the Finance Act, 1926, in the doctrine of succession for the purposes of the Income Tax (*vide* discussion at 2 *M.L.R.* 323). In *United Steel Companies* v. *Cullington*, [1939] 1 K.B. 644, the Court of Appeal considered the effect of the words in Rule XI of the Rules applicable to Cases 1 and 2, Schedule D, Income Tax Act, 1918, as amended by sec. 32, Finance Act, 1926, viz. "the tax payable for all years of assessment by the person succeeding (to a business) shall be computed as if he had set up or commenced the trade, etc., at that time. . . ." In the instant case, the appellant company had been formed to amalgamate the businesses of two steel companies which had been operating with poor results so that they had accumulations of losses and of allowances for wear and tear which they were entitled to set against subsequent profits. It was argued for the new company that it was entitled, as successor to the old companies, to set against *its* profits the accumulated losses and allowances to which the old companies would have been entitled to set against *their* subsequent profits. The Court of Appeal rejected this contention on the ground that, for all purposes of the Income Tax Acts, a successor to a business fell to be treated as though, at the date of acquisition, he had set up or commenced a *new* business; the express words of the section could not be construed to entitle the successor to the benefit of allowances due to the person carrying on the *old* business. *Scottish Shire Lines Ltd.* v. *Lethem* (1912), 49 Sc.L.R. 792, which was a decision to the exact contrary, was distinguished on the ground that it was decided upon the provisions of the Income Tax Act, 1842,

reproduced, it is true, in the Income Tax Act, 1918, by which the successor to a business was assessed upon the average profits of his predecessor, so that the new concern, being charged on these profits, was entitled to the predecessor's unused allowances; the Finance Act, 1926, had, however, repealed these provisions so that cases decided upon them could furnish no precedent in construing the new legislation.

A. Farnsworth.

REVIEWS

WORKMEN'S COMPENSATION. By Sir Arnold Wilson, M.P., and Professor Hermann Levy. Vol. I: Social and Political Development. pp. xxi and 328 (with Index). Oxford University Press. **10s.** net.

This is the third volume in a series by the present authors evidently designed to give a detailed descriptive and critical survey of a number of social institutions which particularly affect the lives of what are called "the working classes." Of these their valuable work on Industrial Insurance has already been reviewed in this journal (see *M.L.R.*, Vol. II, p. 76). The introductory remarks to that critique are generally speaking applicable to the present work which again explores the borderland territory between law, economics, politics and sociology. Once more the authors leave us considerably in their debt for the valuable flood of light which they throw upon a very important subject. They do not attain quite so high a standard as in the earlier volume, a deterioration which appears to be due to overhastiness. This is evident from a certain lack of balance, from a number of repetitions, and from the insufficient character of the comparative treatment of the subject which is pretty well confined to Germany with occasional references to the U.S.A. Recent developments in some other countries, such as Canada, would certainly have been apposite to the argument. Nevertheless as a survey of the development of the system in this country this book is absolutely indispensable to every serious student of the subject.

From some points of view the first chapter on Accidents and Common Law is the most significant for in it the authors, one of whom it will be remembered is a Conservative Member of Parliament, demonstrate with complete impartiality and absolutely up to the hilt how the judges, under the new conditions produced by the Industrial Revolution, failed to adapt the rules of the Common Law so as to protect the working people. They sum up the position admirably in the following statement, "at a moment when workmen most needed the protection of the Common Law it was interpreted by the courts against them through the imposition of three limitations arising from the doctrines on principles of: (1) Common Employment, (2) *volenti non fit injuria*, and (3) Contributory Negligence." Though there are some slight historical errors, and at least one error in Latinity (*tuo . . . laedet*, . . . Sir Arnold!) in this chapter it gives an excellent survey of the developments in the law which as has been made abundantly clear by numerous authors actually modified the Common Law in the interests of the employing class. The law of contract, and those parts of the law of tort which were concerned with the protection of property proved on the other hand much more susceptible of expansion.

In the succeeding chapters the authors trace the attempt to modify the doctrine of common employment by means of the Employers Liability Act, the appearance of the first Workmen's Compensation Act, 1897, the early realisation of how defective this was, and its tardy improvement in 1906 and again in 1923. In the earlier part of this narrative the authors fail to hold the balance evenly between the Liberals and the Conservatives, and Sir Arnold Wilson is perhaps seen flying his political colours. However meagre, the earlier reforms in fact came from the Liberals, and while Joseph Chamberlain is clearly entitled to the credit of introducing

the Compensation Act he did so rather in the guise of a Radical than as a Conservative and very much in spite of rather than with the encouragement of his new political allies. The truth is that the whole development has been secured in the face either of active hostility or grudging acquiescence from the employing class who have feared that every concession would add to the costs of production. This is proved again and again in the present volume from the mouths of their own spokesmen. But while this outlook, though shortsighted, is perhaps natural, it is difficult to condone the complaisant attitude of the official and legal members of the various commissions which from time to time have investigated the workings of the statutes. Neither do the Trade Union representatives appear ever to have taken a line in favour of anything more than a tinkering with an unsatisfactory system. The general impression could not be better summarised than in the words of the authors when commenting on the Report of the Inter-Departmental Commission of 1904 whose labours led to the Act of 1906: "No reader of the Report can avoid the impression that the Committee as a whole was less concerned with the interests of the workmen than with those of the employer."

The whole development shows up the less favourable side of the English method of muddling on. A system of employers' liability was bound to lead to a widespread adoption of insurance. It would have been sensible to provide for a scheme of national insurance in the first instance as was shortly afterwards done in connection with the nation's health. Having established a vested interest in the insurance of workmen's risks the legislature has not had the courage to break it down, though at one time this wasteful system absorbed some sixty per cent of the premium income in expenses and profits, and still takes forty, though it is clear that a nationally organised business could be run at no more than ten per cent of the premiums.

Further, the legislature, or its bureaucratic advisers, have shirked the administrative difficulties attached to making insurance compulsory, so that many a workman's prospects of compensation depend on the solvency of his employer. Again although the Home Office takes a vague interest in the subject there is no system of control or supervision other than sporadic enquiries by occasional commissioners or committees. One of the few far-reaching proposals of the Holman Gregory Committee of 1919, that of establishing a whole time commission has been steadily ignored.

Since the actual administration of the system is in the hands of privately owned insurance companies the real interests of the injured workman receive no consideration; the whole object of the insurer being to escape from his liability at the least possible cost. This has led to the widespread use of lump sum settlements, an evil which has been perfectly well known to everybody concerned for the last forty years, but no adequate steps have ever been taken to cure it. Perhaps the most deplorable result of this system is that it provides no incentive towards, or machinery for, prevention. Among the really valuable features of the present volume are the emphasis which it lays on this point, and the evidence which is produced from Germany to prove what could be done in this direction. Point is added to this by Appendix I, which certainly merits attention. It contains a fairly detailed description of the more important contracting out schemes, and makes it clear that it is possible to provide rather better benefits than those laid down in the Act, with a more humane and sensible administration, and a real attention to prevention of accidents, under

private schemes which do not appear to involve any greater financial outlay.

We await with interest the authors' proposals for reform, though their shadow is clearly cast before by the present volume.

R. S. T. CHORLEY.

THE BRITISH CONSTITUTION. By H. R. G. GREAVES, *Lecturer in Political Science at the London School of Economics and Political Science*. London: George Allen & Unwin, 1938. 296 pp. **7s. 6d.**

If Jennings' *The Law and the Constitution* turns out to be to this age what Dicey's *Law of the Constitution* was to its predecessor, this work may prove to be the *Bagehot* of the present time. There is little similarity in style or in sentiment: Mr. Greaves is less pellucid, and not at all snug. But he is more careful of fact than Bagehot was, and his book, unlike almost all modern work on its subject, bears at every point the impress of a humane but relentlessly retained and self-consistent view. The point of view is a common-sense democratic point of view, and in consequence it is clear that the author supports His Majesty's Opposition rather than His Majesty's Ministers at the present time. But the book is in no sense a party essay, and notably avoids that habit of 30 per cent exaggeration which spoils so much of the writing, if not the thought, of Professor Laski, to whom it is dedicated.

The book is planned to deal first with the legal, then with the social, institutions which govern our form of government. It deals successively with Parliament, the Crown, the Cabinet, the parties, the administration, the armed forces, the administration of justice, the church, the educational system, public opinion, and English democracy in general. Lawyers will cavil at a few such points, such as the statement, on p. 79, that "Since the Statute of Westminster . . . it has become a principle of the Commonwealth that no change in the royal style *or position* shall occur without the agreement of all the Dominions. The royal style and titles, and the succession to the Throne, are thus protected, but the Dominions are free to take away legal and conventional powers and ceremonial position to any extent they like from the monarch upon whose identity and formal titles they are thus bound to agree."

But there is a good deal for which the lawyer will have to thank Mr. Greaves, and not least for his treatment of constitutional convention. Dicey did a great service when he discovered convention as a class of rules forming part of the constitution. Jennings did a further service when he pointed out that some conventions, notably those of British Commonwealth relations, approximated in precision of statement to rules of law, but a disservice when he argued from the fact that the position between law and convention is hard to draw, that the distinction between them is only of secondary importance except for the professional lawyer. Mr. Greaves now corrects that false emphasis by showing how far domestic British convention is simply the subjunctive sense of political propriety of the dominant upper middle class, not formalised and digestified into an intelligible abstract system of rules, and nearer therefore in its nature to fact than to law. This reviewer, at any rate, is grateful to Mr. Greaves for making him appreciate the full urgency, in the interests of democracy, of Mr. Justice Evatt's plea for the translation of the more vital conventions into law.

R. T. E. LATHAM.

THE PRINCIPLES OF ENGLISH LAW AND THE CONSTITUTION. By O. Hood Phillips, M.A., B.C.L. (Oxon), *Barrister-at-Law, Reader in English Law in the University of London.* Sweet & Maxwell, 1939. 558 pp. **21s.** net.

This book covers a rather wider field than its title might seem to indicate. Different parts of it may be used, as the author explains in the Preface, by students of Jurisprudence, of Constitutional Law and of the subject sometimes called the English Legal System. No doubt there may have been room for additional textbooks in these various subjects, but it may perhaps be doubted whether it was wise to have, in effect, combined two or three books in this one volume. The result is inevitably that the learned author has had to compress his material and the severely concentrated result is at times slightly indigestible. This is particularly unfortunate as the author, when he allows himself room, has a happy faculty for giving interesting and lucid explanations, enlivened here and there by a pleasant humour.

The first two chapters are both entitled "Law and the State," and they are designed to give the student an introduction to the necessary background of political theory. Chapter I contains summaries of the main theories of law and of the state. Chapter II contains, *inter alia*, an interesting section on the relation between constitutional law and administrative law, including a brief statement of Dr. Jennings' criticism of Maitland's views. It concludes with a statement of Dicey's theory of the Rule of Law and a criticism of that statement. These brief outlines of various theories, of which the first two chapters mainly consist, are very fair and form convenient summaries for one who has some acquaintance with the originals, but it seems doubtful whether a student without previous knowledge of the subject would be able to profit much from reading such highly condensed statements.

After these two introductory chapters, Part I of the book proper is devoted to a short description of the English legal system and of the elements of English law.

Perhaps the most important part of the book is Part II, on the Constitution of the United Kingdom. This part contains a great deal of material, and the author deserves congratulation upon his success in explaining the law and custom of the constitution at once succinctly and accurately. He does not limit himself to a bare statement of the law, but finds time for various discussions of a more general nature, including for example an admirable discussion of the extent to which members of Parliament are bound by a "mandate" from their constituents. He might perhaps have usefully included a reference to the views held on this subject by Burke who wrote to his constituents in Bristol: "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."

A few points of detail struck the present reviewer as meriting criticism. On page 228 it is stated that the King makes the Accession Declaration at the meeting of the Accession Council. In fact the Declaration is made before Parliament on the first occasion when a new king opens Parliament, or at the coronation, whichever event occurs first; Edward VIII made the Declaration before Parliament on 3rd November, 1936 (see H. L. Debates, 5th series, vol. 103, col. 1), and George VI made it at his coronation. On page 238 appears the statement that "it is a cardinal

rule of British constitutional law that no action can be brought against the King." The word "British" here should be "English" because of course in Scotland the subject can bring an action as of right against the King, through the Lord Advocate, for breach of contract. The same criticism applies to the first sentence on page 311. It is not clear why the functions of the Home Office relating to, e.g. administering the Factory Acts should be dealt with (on page 349) in Chapter X entitled "The Chief Functions of the Executive," while the duties of the Ministry of Health and other similar departments are considered separately in Chapter XII under the heading "The Chief Functions of the Administration." Some rearrangement of these chapters might improve the book in the later editions which will no doubt be called for.

Part III explains the constitution of the British Empire, so far as it is capable of explanation, and contains much interesting material, including an excellent description of the Crown's position as the symbol of Empire unity. There is an explanation of the orthodox British view, exemplified by the decision in *Williams* v. *Howarth*, which is contrasted with the South African view of the divisibility of the Crown.

This is a valuable book which will no doubt be of great assistance to students, for whom it is primarily intended, but it would have better deserved the publisher's description, "readable and interesting," if it had not attempted to cover quite such a wide field in a limited space.

W. I. R. Fraser.

IMPOSSIBILITY OF PERFORMANCE IN CONTRACT. By R. Gottschalk. Stevens & Sons, London, 1938. iv + 141 pp. **7s. 6d.**

This book is an interesting attempt to analyse the law relating to supervening impossibility of performance in contract. The author gives a useful account of the historical development of the doctrine by English decisions, and then proceeds to examine the question in the light of general principles, with special reference to Roman law. The work concludes with some American criticisms of the English rules, and there is a short appendix stating the position in certain foreign legal systems. This wide use of comparative material provides interesting reading, but unfortunately results in a certain lack of clarity and precision. The greatest difficulties which have to be faced in a study of supervening impossibility are the initial problems of limiting the field of investigation and defining essential conceptions. The question of frustration has been the subject of much controversy, and at different times has been confused with fundamental mistake, failure of consideration, repudiation on breach, initial impossibility or illegality and even the tortious conceptions of negligence, inevitable accident and Act of God, while rules of equity have also had some influence on the various decisions. The author would have given the reader a clearer idea of the position had he introduced his subject by a general discussion of the relationship of the doctrine of supervening impossibility to other branches of the law of contract, and to the law of tort, equity and quasi-contract, before proceeding to a detailed analysis of the cases. While he has considered the English doctrine in its relation to other systems, he has failed to assign to that doctrine its place in English law.

In spite of this, however, the author has succeeded in presenting a wealth of useful and interesting material, especially in the course of his discussion of the Roman law of *casus*, which provides an admirable basis

for the consideration of the general principles underlying the doctrine of frustration. He has also emphasised the inconsistencies of the position in England, and in particular has pointed out the defects of the doctrine of implied conditions. On the one hand if the Court is to attribute to the parties a purely fictitious intention to discharge the contract, an intention which in fact they never possessed, why should not the Court go further, and attribute to them an intention to distribute the loss in an equitable manner? On the other hand, the doctrine of implied conditions provides no guide as to the nature of the impossibility which operates to discharge the contract. This is becoming increasingly evident in those cases in which the parties foresaw or could have foreseen the event which caused the impossibility, but did not provide for it in the contract. Frustration should not, logically, depend on the fiction of the implied intention of the parties, but on the happening of an event, on the occurrence of which the law intervenes automatically to put the contract at an end, in accordance with clearly defined principles.

These, and other criticisms of the English rules, make this little work an interesting and readable book. K. JAFFÉ.

MEET THE PRISONER. By JOHN A. F. WATSON, *Honorary Secretary of the National Association of Prison Visitors, 1928–38, Chairman of the Southwark Juvenile Court.* With an Introduction by SIR ROLLO GRAHAM-CAMPBELL, *Chief Magistrate of the Police Courts of the Metropolis.* Jonathan Cape, London, 1939. 303 pp. **8s. 6d.** net.

It affords a great pleasure to review a book that is written with so profound a knowledge of the subject and so much genuine ardour, coupled with a real mastery of the art of writing. The author approaches his task with a twofold qualification, being the Chairman of a London Juvenile Court and a former Honorary Secretary of the National Association of Prison Visitors. It is particularly this latter capacity that dominates his attitude towards the prison problem and enables him to add a note of special interest to the existing literature on English Penology. After the memoirs of ex-prisoners and books of former prison or police officials and of experts with a more or less casual connection with the modern prison system, we are now presented with the first systematic report of a lay magistrate with a regular and first-hand experience of prison conditions extending over a period of fifteen years.

In the first part of his work the author gives a vivid sketch of the development of the English prison system, and even in this often told story he has succeeded in discovering some interesting new facts and persons, as for instance Sarah Martin, one of the most remarkable successors of Elizabeth Fry. There follows a well-informed survey of present-day prison conditions, excluding the Borstal system to which the book makes only occasional references. As already indicated, the author lays particular emphasis on the progress brought about through the efforts of prison visitors, prison teachers, and other voluntary workers, and it is indeed one of the greatest merits of prison administration in this country to have given theoretical recognition as well as practical assistance to the idea that in this field perhaps more than anywhere else the work of reclamation carried out by the State must find its supplement in the voluntary collaboration of private citizens. Whilst this is by now almost a commonplace, the problem as to exactly how far the State can safely rely on such volun-

tary contributions has not yet been entirely solved. Nor has it been generally settled which and what professional qualifications may be necessary for voluntary workers in this field. This might especially be said with reference to Education in prison and After-care for the discharged prisoner—subjects to which some of the most valuable chapters of this book are devoted. In spite of his fully justifiable admiration of the work of many After-care Organisations and of the help given by individual employers, the system itself with its lack of uniformity and co-operation arouses the author's criticism. His conclusion in this respect is "Reform it altogether" by building up a "National Association of After-care" on the model of the Borstal Association, with two distinct departments for young and adult offenders respectively (p. 206). There can hardly be any doubt that the future development will move in this direction. The transfer of the functions of the Prison Commission to the Home Secretary —as proposed by the Criminal Justice Bill—may be the first step towards the creation of a single department for the care and after-care of all delinquents, irrespective of the particular method of treatment they happen to be undergoing (see p. 233).

The author adds a brief summary of the Criminal Justice Bill, as far as it concerns the prison system, and some Appendices which will be particularly welcome to all social workers.

Under the headings "Financial Disability of Ex-Prisoners" and "Civil Disabilities of Ex-Prisoners," the legal position of persons sentenced to imprisonment with regard to Unemployment Insurance and Assistance, Poor Law Relief, National Health Insurance, Pensions, Emigration, etc., receives systematic treatment.

The book fully deserves the recommendation of the Book Society.

HERMANN MANNHEIM.

THE RESIDENCE AND DOMICIL OF CORPORATIONS. By A. FARNSWORTH, Ph.D., LL.M., with a Foreword by LORD MACMILLAN. Butterworth & Co., London, 1939. 370 pp. **21s.**

It has been apparent for a long time that the conflict of laws relating to corporations is one of those many subjects of private international law which stand in dire need of a comprehensive and systematic treatment. The subject has been intensively dealt with in decisions and research works in the United States as well as on the Continent where many opportunities have arisen of discussing problems which have not yet come up for judicial decision in this country. For this reason, perhaps, they have so far escaped the attention of English writers. It is, therefore, a very valuable contribution to a work yet to be written that Dr. Farnsworth has devoted an exhaustive treatise to two questions, viz. the residence and domicil of corporations.

The learned author had already published a preliminary study (1935, 51 *L.Q.R.* 684 *sqq.*) demonstrating that there is an essential difference between the domicil and the residence of a corporation and that it is the latter that English Courts, in Revenue cases, have almost exclusively been concerned with. The author has now enlarged on the subject. After three introductory chapters dealing with the residence and the domicil of individuals and the nature, etc., of corporations he sets out to explain the residence of a corporation in connection with income tax, commercial

"domicil," jurisdiction and the *situs* of debts. In the last chapter, which is probably the most interesting, he analyses the problem of the domicil of a corporation while the six appendices treat such subjects as the residence of the individual in American law, the nationality of a corporation at common law, the basis of jurisdiction over foreign corporations, the "Carrying on of business" by a foreign corporation, etc.

It is sufficient to indicate these headings to show that Lord Macmillan is fully justified when he says in his Foreword that the author "has adventured into a territory which, if not *terra incognita*, may at least be said to have been hitherto very imperfectly mapped," and one cannot but agree with his further remark that this is "an admirable monograph" and that "nowhere else is the whole learning on the subject to be found so exhaustively set out and so critically analysed." This is particularly so as the author has collected much valuable American and also some Continental material.

Where the subject is most unexplored and where, therefore, the authors' observations will be particularly appreciated is in connection with the question of the domicil of a corporation. He holds the view that it is not the law of nationality, but the law of the domicil which determines the corporation's status and capacity. The law of the domicil of origin is the law of the country where the corporation is incorporated and though it might theoretically be possible for a corporation to acquire a domicil of choice, yet the law cannot recognise it, since the status and personality of a corporation must always depend on the law by which its constitution and character is framed. The place where central control and management is exercised determines the residence, but not the domicil, of the corporation.

But, it may respectfully be asked, is this reasoning not a little too theoretical? It is probably agreed on all sides that a corporation's status is always determined by the *lex incorporationis*. Whether this is described as the law of nationality or the law of domicil does not really matter. The only point where it becomes important to discuss the corporation's domicil is in connection with the rule of the law of income tax according to which a person resident in England, but domiciled abroad need not pay tax upon income arising abroad but not remitted to this country. In the author's view a French company whose central control is exercised in England and which, therefore, resides here, is exempted from paying tax on such income since its domicil (of origin) is, and must always be, in France. It may be thought by some that when it becomes necessary to decide in this single connection where a corporation is domiciled, not a question of principle, but a question of construction of the Income Tax Act, 1918, is involved. Notwithstanding the author's well justified insistence on the distinction between residence and domicil, might it not be permissible and necessary to hold that in that provision the word "domiciled," if applied to corporations, merely refers to that place which, both as regards *factum* and *animus*, comes nearest to the individual's permanent home, i.e. to the place where central control is exercised?

Since the book was written, the problem of the domicil and residence of corporations has acquired fresh prominence owing to the Trading with the Enemy Act, 1939, and the Defence (Finance) Regulations Amendment Order, 1939 (S.R.O., 1939, No. 1067), relating to exchange restrictions. There can be no doubt that Dr. Farnsworth's book will also prove very useful for the purpose of construing certain provisions of these enactments.

F. A. Mann.

THE LAW OF INLAND TRANSPORT. By Otto Kahn-Freund. London: Stevens and Sons, Ltd., 1939. xxiii + 424 pp. **12s. 6d.** net.

This is a new edition of a well-known text-book, Disney's *Law of Carriage by Railway*. Like his predecessor, Mr. Kahn-Freund has written an introduction to the law of inland transport admirably suited to the needs of those who wish to know something of this body of law, but who do not propose to specialise in it.

New methods of transport have grown up and important changes have been made in the law governing carriers. Much that has become obsolete in Disney's original work has been left out, and sections have been added on topics which have arisen since. The layman should be grateful to Mr. Kahn-Freund for undertaking this work, for he is a lucid and interesting guide through what otherwise might be impassable territory. The student of law will read this book as a preliminary study only; but a text-book of this kind must very often be all the instruction in this field which can be given to the student of transport or of commerce. He will get from it what he wants most—a comprehensive outline of the legal framework within which the transport business operates to-day.

The law of carriage was originally applied to the carriers who preceded the railway. Important changes were made in the legal rights and duties of carriers as the law was adapted to fit the situation created by the growth of large railway companies, changes which culminated finally in the Railways Act of 1921. The reader is shown the changes in the status of railway companies as carriers which were brought about by the Standard Terms and Conditions of Carriage, published in 1928. This process of change continues, as the small competitive road carrier invades the monopoly of the railway companies. The layman will learn that the obligations of the new carriers by road to their customers, and their privileges as carriers, are not yet decided. The student of commerce should be interested in the progress which is being made towards complete definition of the legal status of the motor haulier. Road hauliers, it appears, are neither statutory carriers like railways nor common carriers like their predecessors, the waggoners. They are usually private carriers. This status may not always be the privileged one, since a road carrier may sometimes gain by showing that he is a common carrier, if for example, the traffic in dispute should consist of valuable goods.

Railway law is treated very fully. The author describes the Acts of Parliament and shows, by citation and explanation of leading cases, how statutory provisions have been interpreted by the courts. After so ample a discussion, it is a disappointment to find that this plan was not followed in the section dealing with the law governing road transport. There we are told only what is in the Acts of Parliament—it would have been interesting and valuable to have an account of the manner in which, for example, the Road and Rail Traffic Act, Part I, has been interpreted by the courts, together with citation and discussion of the more important cases determining in what circumstances carriers' licences shall be issued or withheld.

Mr. Kahn-Freund incorporates chapters on the legal position of the passenger. It will surprise the layman to discover what precautions the prudent traveller should take to ensure that his legal rights remain unimpaired. The reviewer, for one, did not realise that travel was so fraught with opportunities for the conscientious litigant!

Gilbert Walker.